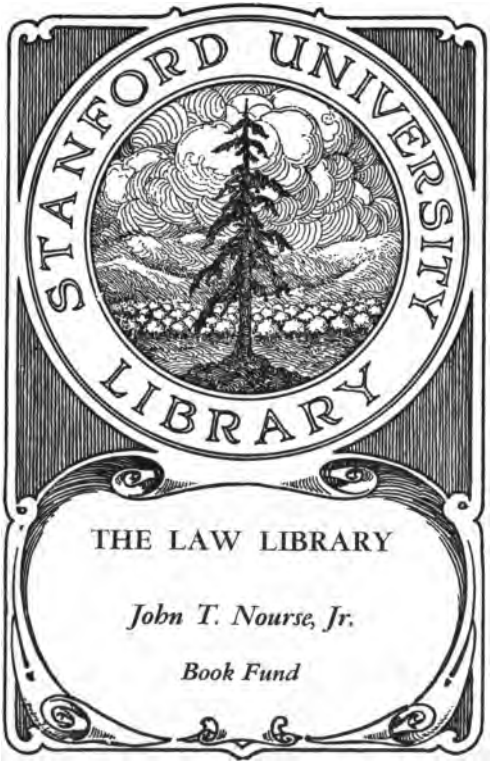

THE

CONFLICT OF LAWS

IN

CASES OF DIVORCE.

BY PATRICK FRASER,
ADVOCATE.

"For Courts to quarrel and contend about Jurisdiction, is a piece of human frailty; and the more, because of a childish opinion, that 'tis the duty of a good and able Judge to enlarge the Jurisdiction of his Court; whence this disorder is increased, and the spur made use of instead of the bridle. But that Courts, thro' this heat of contention, should, on all sides, uncontrollably reverse each other's decrees, which belong not to Jurisdiction, is an intolerable evil, and by all means to be suppress'd by kings, the senate, or government. For 'tis a most pernicious example that Courts, which make peace among the subjects, should quarrel among themselves."—BACON.

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CONFLICT OF LAWS IN CASES OF DIVORCE.

THE conflict of laws in reference to cases of divorce has been the matter of controversy in this kingdom for more than half a century. For a considerable period the controversy has flagged, being trampled out of sight by subjects of a more pressing and imperial character. Yet it is one which possesses all the largeness of national, and all the individuality of private, interest. New life has been thrown into the discussion by the recent proceedings of the House of Lords in reference to the Conjugal Rights (Scotland) Bill. Not merely has the old controversy been revived, but doctrines which had been considered settled have been called in question, and strong language has been employed in stigmatising the opinions which have guided the decisions of Scottish and American Courts,—opinions which have their source in the Roman Jurisprudence, and which, in the balance of good and evil, are more consistent with justice than the opposite.

The assailant in the present instance is a Scotsman. It is not the first time that he has signalised himself in attacks on the consistorial law of his native country; but, in the present instance, his views have had a practical effect, which, fortunately for Scotland, they never before attained. Lord Chancellor Campbell has contrived to deprive us of a measure that would have remedied many evils. He has kept many unfortunate persons in trouble whom the Conjugal Rights Bill would have relieved; and he has not advanced a step in establishing a theory alike condemned by expediency and by principle. In all this he is no doubt acting with all the confidence of conviction and all the earnestness of a patriot. No one will question his sincerity, but some may see in his

proceedings, how impatience of present inconveniencies, eagerness to bring order out of chaos, and reduce things to harmony with preconceived theory, often lead to illogical conclusions sagacious and unimaginative minds. In examining his opinions, we cannot be charged with any want of respect to a man who has so nobly earned it. It is the greatest tribute to his opinions that they have in Scotland excited so much attention. We are all the more proud of our country because she has sent forth one who has so worthily sustained the reputation of her sons, and who, upon a trying field, has exhibited the splendid spectacle of great talents long exercised with difficulties and ultimately crowned with triumph.

The Lord Advocate of Scotland introduced into the House of Commons, during the session of 1860, a Bill for the amendment of the law of Scotland as to husband and wife. The pressure of business in that House prevented it from passing through its necessary stages, so as to allow of it being taken into consideration by the House of Lords before the day in July after which their Lordships will not consider any new measure unless it be of pressing importance. It thus became necessary to withdraw the measure from the Commons, and to introduce it into the Lords, where it appeared under the auspices of the Lord Chancellor (with a new clause, which has called forth these observations), under the name of "The Conjugal Rights (Scotland) Bill."

The object of the measure was to remove from the law of Scotland many of those oppressive rules that operate so harshly against married women, and to smooth the administration of justice in reference to conjugal quarrels. It referred to many very different matters, all of which have long required reformation. It is needless, however, to dwell upon them, as they constitute no subject of controversy. It is not intended here, to sing the encomium of the Bill, or to write its epitaph. It attained as great a unanimity of approval as has ever been awarded to any Bill affecting subjects so delicate and important. But, unfortunately, it was taken out of Scottish hands; and we have to deplore the loss of a measure which would have effected great and necessary reforms, in consequence of strong opinions entertained by the Lord Chancellor

as to jurisdiction in matters of divorce,—opinions which are not favoured on this side of the Border, and which it is proposed now to submit to examination.

The Bill contained two clauses, to which alone the Lord Chancellor appears to have directed his attention,—at least, they were the only clauses to which he devoted special remark. They were the be-all and end-all of the Bill. Without them it was a mere collection of dry stubble, fit only for the burning; and as they were not allowed to become law, the rest of the Bill was worthy only of oblivion.

The Faculty of Advocates took the liberty of differing in opinion from his Lordship in reference to the two clauses in question, and they expressed that opinion in a short Report, which they communicated to his Lordship. This Report he made the subject of comment, and in the place where he made it, he was safe from all reply. Now, when a great magistrate undertakes to alter ancient laws, to rebuke a College of Lawyers, and to inaugurate a new era, we expect that the lofty message will be conveyed in the language of moderation. We will all listen with respect to the enunciations of a calm and serene wisdom; but it is difficult to acquiesce in the conclusions of a Judge who states, as axiomatic truths, the opposite of what has guided juridical opinion for many ages. In the mode in which the subject has been treated there is rather too much anger in his energy, and gall in his argument. The matter is of such a nature that lawyers might agree to differ upon it; and the loftiest wisdom might be subdued by the remembrance of the fact, that there have been many phases in the controversy, and great names enrolled on both sides.

I. In the "Husband and Wife" Bill, when it was in the House of Commons, there was a clause in the following terms:— Clauses in the Husband and Wife Bill limiting the jurisdiction.

"XIX. It shall not be competent to raise and prosecute an action of divorce, unless, first, the defender has his or her domicile in Scotland; *or, secondly, the action being one for divorce on the ground of adultery, the adultery was committed in Scotland, and the defender has been personally cited in Scotland;* or, thirdly, the action being one for divorce on the ground of desertion, the defender has deserted the pursuer at a time when the pursuer had a domicile in Scotland, the pursuer continuing to

reside in Scotland until the action is raised; and the domicile herein referred to shall be held to be the domicile according to the law of which the succession to moveable estate would be regulated in cases of intestacy."

Clause in the Conjugal Rights Bill as to jurisdiction.

In the "Conjugal Rights Bill" introduced by Lord Campbell into the House of Lords, there were two clauses in these terms:—

"XVIII.. It shall not be competent to raise and prosecute an action of divorce unless the defender *has his or her domicile in Scotland;* or, the action being one for divorce on the ground of desertion, the defender has deserted the pursuer at a time when the pursuer had *her* domicile in Scotland, the pursuer continuing to retain such domicile or reside in Scotland until the action is raised; and the domicile here referred to shall be held to be the domicile according to the law of which the succession to moveable estate would be regulated in cases of intestacy."

"XIX. A decree of divorce pronounced after the passing of this Act by the Court of Session in terms of this Act, shall be recognised and given effect to as a valid decree dissolving the marriage, to all intents and purposes whatever, in all parts of Her Majesty's dominions, notwithstanding that the marriage thereby dissolved may not have been celebrated in Scotland."

Divorce for adultery only allowed by Bill when defender domiciled in Scotland.

It will be observed that the passage in italics, in the first of these three clauses, has been omitted in the second Bill. The result is, that divorce, on the ground of adultery, could not be obtained in Scotland, except in the single case where the defender had his or her domicile of *succession* in that country.

The Faculty of Advocates had, with considerable hesitation, approved of the clause in the Husband and Wife Bill as being a compromise, though not a satisfactory one, of a subject that had been the matter of collision between the English and Scottish Courts for half a century. They had doubts as to the propriety of legislating upon the matter at all; but they yielded, in order to obtain the provision declaring effectual in all parts of her Majesty's dominions decrees of divorce by the Scottish Courts. When, however, the "Conjugal Rights Bill" appeared, limiting the jurisdiction of the Scotch Courts to the single case where the defender had a Scottish domicile of *succession*, and excluding it in the case where the adultery was committed in Scotland without domicile, the whole position of matters was changed, and the Committee of Faculty considered it to be their duty to remonstrate against the proposed enact-

ment. Their remonstrances were however in vain, so far as regarded the House of Lords. The Bill passed as it was introduced by the Chancellor, and the Commons had to deal with it. Upon the motion of the Lord Advocate in the House of Commons, both clauses were expunged. I do not know what his Lordship's opinions may be,—whether he took the course he did out of deference to the remonstrances of the Faculty, of which he is the Dean,—whether he considered that it was too hasty a proceeding on the very eve of the prorogation of Parliament, when almost every Scottish member had left London, to effect the most important alteration in international law that has been proposed in our time,—or whether the clauses were struck out in consequence of his conviction of their inexpediency and injustice. Whatever may have been his motive, it will have at least this good effect, that if the law is to be changed, it will not be so until it is understood; and the heat with which the subject seems to have been taken up in the House of Lords may, ere another session of Parliament, have subsided. It would have excited some commotion, at least in the profession, to have legislated in a hurry and repented at leisure, upon so important a subject as this, or to have made the interests of the people of Scotland dependent on the rashness of a momentary impulse, or of an impatient caprice.

The rejection of these clauses by the House of Commons involved the necessity of sending the Bill back to the House of Lords, and on the 23d of August 1860 the Lord Chancellor (two Peers besides himself being present) moved their Lordships to disagree with the Commons' amendment, and to assign reasons for this resolution. The speech of the Lord Chancellor, on 23d August 1860, was as follows:—

Speech of Lord Chancellor.

"The Lord Chancellor said that, notwithstanding his great inclination at all times to agree to any amendments which the Commons might propose in Bills sent down to them, he deemed it his duty to advise their Lordships to disagree with the alleged amendments in this Bill. Those amendments consisted in altogether omitting two clauses from the Bill which constituted the life and substance of the measure. One was that a divorce *à vinculo matrimonii*, pronounced by a court in Scotland, should have force and validity all over the dominions of her Majesty. At present, if a marriage was celebrated in England, and the divorce took place in Scotland, the divorce had full operation in Scotland, but none in England, and the parties still remained husband and wife on one side of the Tweed, though they were separated on the other. They might law-

fully marry again, and their children would be legitimate in Scotland, but bastards in England. That was an anomaly most disreputable to the law of the United Kingdom. The clause to which he referred provided, that when a sentence of divorce was duly pronounced, proper caution being taken to guard against collusion or fraud, it should be operative all over the world. To introduce that enactment there was a previous clause which protected the Scotch Courts against collusion and fraud. At present the Scotch Courts took cognisance of cases of divorce if the parties had been resident in Scotland forty days, which induced people to go to Scotland from other countries, and, he was sorry to say, from England, collusively to obtain a divorce, to which they were not entitled elsewhere. Again, the Scotch Courts claimed a right of jurisdiction which was called *ratione originis*. If a Scotchman born went into another country and abandoned his native land, acquiring a domicile elsewhere, the Scotch Courts said they had a right with respect to him to enforce the law of divorce, although he remained domiciled in a foreign country, *ratione originis*. That seemed to him to be very unreasonable, and contrary to all principle, because the law of divorce ought to be administered in the tribunals of the country where the parties were domiciled, and where they were known. But the existing state of things necessarily led to uncertainty, and even to fraud. If a Scotchman had left his own country and acquired a domicile elsewhere, he had only to return to Scotland to recover his domicile there, and then he was entitled to a divorce as if he had never crossed the Tweed. Again, it was said that, *ratione delicti*, the Scotch Courts ought to have jurisdiction in cases of divorce, although the parties were not domiciled in Scotland. If adultery were a crime, it ought to be prosecuted in the country where it was committed; but a suit for divorce was a mere civil proceeding, and the remedy should be given only to those who were domiciled in the country."—(*Times' Report.*)

The reasons sent to the Commons were in the following terms:—

"The Lords disagree to the amendment made by the Commons to leave out clause 18, for the following reasons:—

"*Because* a suit to dissolve the tie of marriage ought to be entertained only by the courts of the country in which the parties whose marriage is to be dissolved are *bona fide* domiciled, according to the well known law by which the succession to moveable estate is regulated in case of intestacy.

"*Because* the present practice in Scotland of entertaining such suits *ratione originis*, *ratione delicti*, or upon a forty days' residence in Scotland, is inexpedient.

"*Because* if the domicile of origin has been abandoned, and a new domicile has been acquired in a foreign country by a native of Scotland, he ought not, for the purposes of such a suit, to be considered domiciled in Scotland, unless he should have duly recovered his domicile in his native country.

"*Because* jurisdiction over adultery, *ratione delicti*, applies where

adultery is to be prosecuted as a crime, and not to a suit to dissolve the tie of marriage.

"*Because* if a residence of forty days in Scotland is considered sufficient to give jurisdiction to dissolve a marriage between parties married and domiciled in another country, a facility is afforded to obtaining of collusive divorces, and a scandal is brought on the administration of the law of marriage.

"The Lords disagree to the amendment made by the Commons to leave out clause 19, for the following reason:—

"*Because* the most grievous inconvenience arises from the existing state of the law of Scotland and England on this subject, as declared by judicial decisions in both countries, for according to this, where parties have been married in England, a sentence of divorce pronounced in Scotland is valid in Scotland, and a nullity in England, so that the divorced woman still remains the wife of the husband in England, but the husband and wife are free to contract another valid marriage in Scotland, and the children of such second marriage are legitimate in Scotland, but bastards in England, and the husband or wife again marrying in England after the divorce in Scotland, is liable to be indicted for bigamy, and punished by penal servitude.

"With the preceding exceptions, the Lords agree to the whole of the amendments made by the Commons to the Bill."

The last reason may be at once dismissed. Every one concurs in it; and if the House of Lords will pass the 19th clause without the 18th, they will put an end to the conflict between the English and Scottish Courts; but this they will not do. They will pass both, but not one; and therefore the Lord Advocate appears to have thought it better to have neither.

II. There are two important questions raised and summarily decided in the speech of the Lord Chancellor. The first is, whether an English marriage can be dissolved by a Foreign Court of law under any circumstances whatever? The second is, assuming that it can,—under what circumstances can the Foreign Court dissolve it?

Can an English marriage be dissolved by a Foreign Court under any circumstances.

The Lord Chancellor has in his speech referred to both of these questions. He states, in the most positive manner, that "if a marriage was celebrated in England, and the divorce took place in Scotland, the divorce had full operation in Scotland, but none in England." But I venture respectfully to submit that the Lord Chancellor has not done justice to the English Courts; and that Time, in this case (of course, at the expense of much individual suffering), has effected the remedy

as completely as if an Act of Parliament had passed immediately after the decision in the case of Lolley. The judgments of the Scottish Courts which dissolved marriages celebrated in England never varied, either before that decision or since; and the result of the long controversy has been, as I will immediately show, to obtain an admission, even from English Courts, that the doctrine of Lolley's case cannot be maintained. Lord Campbell's statement as to the present law, must have been made in forgetfulness of the judicial determinations, of the English and Irish Courts, since the case of Lolley.

Case of Lolley.

That celebrated case was argued in the year 1812, and while we have the result of the argument, we have neither the argument itself, nor the reasons for the judgment.[1] It does not appear of what country Lolley was. He married in Liverpool, committed adultery in Scotland, was divorced at the instance of his wife by the Commissary Court of Edinburgh, and then returned and married another woman in Liverpool. He was indicted for bigamy, and pleaded in defence the decree of divorce, but was convicted. The judgment is thus mentioned in the report:—"This case was argued before all the Judges in Sergeants Inn Hall, on Monday, the 7th of December 1812, by Brougham, for the prisoner, and Littledale, for the Crown, when the Judges held the conviction right, being unanimously of opinion, that no sentence or act of any foreign country or State could dissolve an English marriage *à vinculo matrimonii* for grounds on which it was not liable to be dissolved *à vinculo matrimonii* in England; and that no divorce of an ecclesiastical court was within the exception in sect. 3 of 1 Jac. I. c. 11, unless it was the divorce of a court within the limits to which the 1 Jac. I. extends. The Judges gave no opinion upon the husband's conduct in drawing his wife to sue for the divorce, because the jury had not found fraud."

In an article which appeared in the *Edinburgh Review*, vol. xlvii. p. 112, in the year 1828, which bears indubitable evidence of a well-known Roman hand, we have a more authoritative and distinct statement of the grounds of judgment. The article is intended as a commentary upon the Scotch law of marriage, and the collision between the Courts of the two

[1] It is reported in Russell and Ryan's Criminal Cases, p. 237.

countries, and the writer professes to "have been favoured by one of the counsel in the cause with the following note of the judgment in the case of Lolley." Whether there was any favour in the matter one may well doubt. The article deals largely with the abduction case of Edward Gibbon Wakefield; and the cross-examination by Mr *Brougham* of a "Scotch counsel" is given at length, shewing, in the writer's estimation, the discomfiture of the latter; "and that he was unable to solve the question, never having considered it in its true light." [1]

It appears that the judgment in Lolley's case was not delivered in London. At that time, when a point was reserved for argument before the Judges, the reviewer says, they "delivered no opinion formally, but inform their brother privately, and he, or whoever is in his place at the next assize for the same place, pronounces the judgment. Mr Baron Thomson went to Lancaster the assize of 1813, and delivered the judgment. The note is as follows:"—

"*Thompson*, B., began with stating at length the indictment and trial (*Coram* Wood, B.), and then stated the points reserved, reading the evidence from the Baron's notes. He said the case had been most fully argued before the Twelve Judges, and that every point had been made in it on both sides; and he proceeded in these words,—'The Judges were unanimously of opinion against the prisoner upon both the points reserved. They all agreed,—

"'1. That a marriage solemnised in England is indissoluble by any sentence either at home or abroad, or by any authority except by an Act of the Legislature. 2. That the proviso in the statute (1 Jac. I. c. 13) relates only to the proper ecclesiastical courts of England; consequently, the prisoner is well convicted;' and he sentenced him to seven years' transportation." [2]

This note is so explicit as to leave no room for doubt in

By Lolley's case no Foreign Court can disolve an English marriage.

[1] Any amount of vituperation was certainly justifiable against the "Scotch counsel," if (being ashamed of the nomenclature of his country) he introduced the venerable names of Stair and Bankton to the English Courts under the guise of "Lord Stowers" and "Lord Benington," which "the only correct and authentic report" says he did.—*Murray*, London, 1827.

[2] Edinburgh Review, vol. xlviii. p. 112.

regard to the import of the judgment. But the point is so clearly stated by the Edinburgh Reviewer (who took so large a part in the argument), that I shall here quote it in order to show the length to which the English Courts were prepared to assert the principles of their own local law. "The rule in Lolley's case is the more contrary to the principle of the marriage law, because, independent of the fact having been committed in evasion of the English law, it *denies that any force can be given to a foreign divorce, even when the parties are regularly domiciled in a foreign country*, have a *bona fide* ground of dissolving their marriage, and have not gone abroad with the intent of defrauding the laws of their own State."

Therefore if a *Scotsman* went to England, and there married an Englishwoman, and took her to his *Scottish domicile* where he ever remained, and there divorced her for adultery committed in Scotland, any subsequent marriage by him, wherever celebrated, would be null in England, and the children of it illegitimate. The doctrine, as stated in both reports, goes to this extreme. Of course, the same result would follow, if, at the time of the first marriage, the parties were domiciled in England, and removed from that country to Scotland, where they were domiciled at the date of the divorce.

A doctrine like this, which sets at nought a rule in regard to which all jurists,—except the men who pronounced the decision in this unfortunate case,—are agreed, was certain to be reargued, and in course of time to be reversed. From the period when international law began to be studied as a science, down to the case of Lolley, the law of domicile was held to regulate the status and rights of married persons. Whether these were affected *also* by the law of temporary residence, or of delict, or of origin, is to be inquired into hereafter; but as to domicile, the opinions were undivided.[1] No doubt, there are exceptions even to it, founded upon moral and religious grounds. *Bona gratia* divorces, though allowable by the law of domicile, are not *juris gentium*, and foreign courts are not bound to recognise them. But divorce for adultery, or malicious desertion, is sanctioned by the Christian Scriptures, and is founded upon such obvious reasons of morality as to elevate

[1] 1 Burge, 13-14; Story, sect. 51.

it to be a right *juris gentium*, and to be given effect to when granted by the law of domicile.[1]

Accordingly, Lolley's case has been followed by the condemnation of the international jurists of Europe and America.[2] I am not aware of any writer, or any judge out of England, who has attempted an excuse of it, except a Chief-Justice of the Court of Pennsylvania, who suggests a reason for it in the "unavoidable consequence of the British tenet of perpetual allegiance,"[3]—a doctrine of which more hereafter.

It is not intended here to resume the argument upon the old formula of "indissolubility being of the essence of the contract." Is it not written in a hundred treatises, and commented on by as many judges, during the half century since it was first promulgated? To what good would it now tend, to take up the dogma which its authors have abandoned, and seriously consider as the subject of a veritable controversy, a doctrine which is no more? I profess only to narrate the history of this branch of law from the decision in Lolley's case down to our own time, as the best vindication of the course then taken by the Scottish Courts, and as somewhat of a guarantee that the legal bodies in Scotland, if not now as clearly right as they were then, are entitled at least to a patient hearing. If a doctrine promulgated on the authority of the unanimous opinion of "the twelve Judges of England" has been gathered to the limbo of exploded fallacies, the Lord Chancellor may well pause before he assumes the undeniable absurdity of the Scottish juridical opinions as to the *forum competens*.

Danish Divorce of English Marriage not recognised in England.

The case of Lolley seems to have slept in peace, so far as practical law is concerned, till the year 1831. In that year there occurred, in the English Court of Chancery, the case of M'Carthy v. Decaix,[4] which is worthy of notice, as being the only decision in which the case of Lolley has been followed. The marriage was in England; the husband was a Dane by birth, fortune, and domicile; and the wife an Englishwoman.

[1] The peculiarity of the French law will be noticed hereafter.

[2] See as to America, Dorsey v. Dorsey, 1 Chandler Rep. 287; Story, sect. 332.

[3] Dorsey v. Dorsey, 7 Watts, 349.

[4] 2 Russ. and Mylne, 614; 2 Cl. and Fin., 568, note; 3 Hagg, 642, note.

Denmark was the place of the matrimonial domicile, and they were divorced there, and the domicile was there at the time of the decree. The only circumstance, therefore, which could excuse an English Court in refusing to recognise the validity of the Danish divorce, was the fact of the ceremony of marriage having taken place in England. The point for decision was, whether the Danish divorce dissolved the marriage, so as to affect, as against the wife's representatives, rights of property in England, to which country, after the divorce, she had returned, and there died. Lord Eldon hesitated (*suo more*); but Lord Brougham, having succeeded to the Great Seal, held himself bound by Lolley's case, and pronounced the Danish Divorce ineffectual to dissolve the marriage. This view of the case of Lolley, it will be observed, is in accordance with the statement of the Edinburgh Reviewer above quoted; and was announced by a Judge, who as counsel argued that case, and who may be fairly presumed to know what it meant as well as any man living.

Attempts by English Courts to get rid of Lolley's case.

But the whole efforts of succeeding English Judges has been to get rid of a conclusion which involved such momentous consequences to individuals, and which brought them into direct antagonism with the Courts of every Protestant nation by whom divorce *à vinculo* is granted. A new element was, therefore, introduced into the discussion by Dr Lushington, so as apparently to save the credit of the English Courts.

In the same year (1831), but after M'Carthy's case, the case of *Conway* v. *Beazley* was decided by Dr Lushington in the Consistory Court of London, (3 Hagg, 639.) Samuel Beazley, a domiciled Englishman, was married to a Miss Richardson at Kensington. He was thereafter divorced, at his wife's instance, by the Commissary Court of Edinburgh. He then married Emily Conway in Edinburgh, and she (apparently being as unhappy with him as his first wife) instituted a process of nullity of the marriage, on the ground that, at the time of contracting it, the first marriage subsisted. Now, Dr Lushington's course was perfectly plain, if Lolley's case was good law. The marriage was in England, and, therefore no court of any foreign country could dissolve it. But Dr Lushington refused to accept this rule. He introduced the element of domicile

into the case, and said,—"Before I could give my assent to such a doctrine (*not meaning to deny that it may be true*),[1] I must have a decision after argument upon such a case as I will now suppose—viz., a marriage in England, the parties resorting to a foreign country becoming actually *bona fide* domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve Judges, or the other high authority to which allusion has been made, then, indeed, it might have set this important matter at rest; but I am not aware that that point has ever been distinctly raised; and I think I may say, with certainty, that it has never received any express decision."

Having ascertained that the domicile was in England, Dr Lushington, on a future day, pronounced judgment in these terms:—"It is useless, however, to reason from principles or analogy. I am *bound by authority* (?); for, since it now appears that neither of the parties to the first marriage were at any time *bona fide* domiciled in Scotland, *no sound distinction exists between the present case and that of Lolley.*" What! no sound distinction! Surely this is language divorced from fact. The learned Judge himself states, as matter of fact, that in Lolley's case "*there does not appear to have been any discussion upon the very important question of domicile;*" and Dr Lushington knew this, for he says that he well remembered the argument, and in this he is confirmed by the still better authority of the Edinburgh Reviewer, who argued it. To say, therefore, that Conway *v.* Beazley was decided upon the authority of Lolley, is simply to take advantage of an accidental identity of circumstances in both cases as to domicile, which the twelve Judges did not take into consideration at all. It certainly would have been only consistent with the judicial character of Dr Lushington, and what his position entitled him to assume, if he had at once said (as his judgment implies)

[1] This formula, or clause of style, runs (as will be seen from the following cases) through all the subsequent judgments. Every Judge says that Lolley's case *may be* quite right, but no one decides according to it, —excepting, of course, M'Carthy v. Decaix.—See dictum of Lord Lyndhurst, 2 S. & M'L. 230.

that Lolley's case was wrongly decided. The reservation in his judgment was expressed in the following terms:—"My judgment, however, must not be construed to go one step beyond the present case; nor in any manner to touch the case of a divorce *à vinculo*, pronounced in Scotland between parties who, though married when domiciled in England, were, at the time of such divorce, *bona fide* domiciled in Scotland; still less between parties who were only on a casual visit in England at the time of their marriage, but were both then and at the time of the divorce, *bona fide* domiciled in Scotland."

Dr Lushington's doubts as to principles of Lolley's case.

Let us now carry our view to Ireland, where we have the next decision in order of time in the case of M'Ghee *v.* M'Allister, which occurred in the Court of Chancery in December 1853, and where a Scottish divorce of an English marriage *was sustained.*[1] The facts were these:—Charles M'Allister, a Scotsman by birth, having been absent three years from Scotland, was married in England, to Mary Brabazon; the parties resided for a year in Scotland after the marriage, and thereafter during ten years in France, when the husband returned to Scotland, and obtained a decree of divorce (on the ground of desertion) against his wife. In a property suit in Ireland it was contended "that the marriage was to be determined by the law of the place where it was celebrated, and was consequently an English marriage, still subsisting and unaffected by the decree of the Scotch Court;" and that therefore a second marriage, which the wife had entered into, was null. The Irish Lord Chancellor held "that the divorce dissolved the first marriage, and consequently that the second marriage is valid, both in this country and in Scotland." He held that the marriage was a Scotch marriage, and that the validity of the divorce depended upon the law of the matrimonial domicile at the date of marriage, which was Scotland. Referring to Lolley's case, his Lordship said—"Whether that case be followed or overruled, I think it plain that the principle of it will not be extended, and ought not to be applied to a case like the present, where one of the parties was, *at the time of the marriage*, a domiciled Scotsman."

Lolley's case disregarded by Irish Chancellor.

[1] 3 Irish Chancery Rep. p. 604.

What tortures this case of Lolley has inflicted upon English and Irish Judges! What ingenuity to get rid of the decision without frankly pronouncing it erroneous! Which of these two opposite principles shall be adopted—announced by the respective Judges in the cases of Conway and M'Ghee? Dr Lushington says that it is the law of the domicile *at the date of the divorce*, which shall ascertain its validity. The Irish Chancellor says it is the domicile *at the date of marriage*. Apparently the latter Judge considers the case analogous to that of legitimation *per subsequens matrimonium*, where the law of the matrimonial domicile,—that is, the domicile at marriage,—governs the question of the legitimacy of children *ante nati*: and he specially founds upon the case of Monro,[1] where this doctrine was given effect to. He would therefore hold that the divorce would be valid, although at the time when the decree was pronounced, the matrimonial domicile in Scotland had been lost, and an English domicile existed.

A Scottish divorce refused effect in England, from want of domicile at date of decree.

The next case is that of Dolphin *v.* Robins, decided in 1858 by the English Divorce Court,[2] and afterwards on appeal by the House of Lords.[3] A domiciled Englishman married an Englishwoman in England. The husband came to Scotland, and committed adultery there; and after he had been resident for six months in that country, the marriage was dissolved by decree of divorce at the instance of the wife, who afterwards married a domiciled Frenchman, and died resident in France. In a suit as to the validity of her will, the question as to the effect of the Scotch divorce of her first marriage was raised, and it was held to be ineffectual to dissolve the marriage, the ground of judgment being that, at the date of the divorce, the domicile of the parties was in England. In the House of Lords, this doctrine was affirmed. And Lolley's case, where domicile was never argued at all, is again cited as authority for a decision, which is made to rest entirely upon domicile. Lord Cranworth added (as if apparently still to save the credit of the case of Lolley), "Whether they (the Scotch Courts) could dissolve the marriage, if there be

[1] Monro v. Monro, 1 Rob. Ap. 492.

[2] Swabey and Tristram, p. 37. [3] 3 M'Queen, p. 56?

bona fide domicile, is a matter upon which I think your Lordships will not be inclined now to pronounce a decided opinion."

An American divorce of an English marriage not declared invalid, though no domicile proved.

We now come to a case where, if there had been a collision, it would not have been between the English and Scottish, but between the English and American Courts.[1] An Englishman married an Englishwoman in England, and in that country they took up their matrimonial domicile. The husband and wife thereafter went to America, and the marriage was dissolved by the Court of Common Pleas in Philadelphia, by reason of the husband's adultery. The husband, after the divorce, married the woman with whom he committed the adultery. The wife returned to England, and instituted a suit for divorce *à vinculo* against her husband in the English Court of Divorce, founded upon the fact of cohabitation with the Amercan woman, which followed after the American divorce. The point as to whether an American domicile had been acquired, was made matter of question, and was not cleared up. The judgment is put upon the ground of personal exception, which, when stated in analogous circumstances in the above case of M'Ghee, the Irish Lord Chancellor rejected. "The petitioner," said Mr Justice Wightman, "is in this dilemma; *either the American decree of divorce is valid*, in which case the parties were at full liberty to marry again, and the respondent has not committed adultery by living with the woman he married; or the American decree cannot be recognised in this Court as valid. But as it was obtained at her instance, she has no right to complain of the consequences which might naturally be expected to follow it. It might be said that she connived at the adultery of her husband. The petition must therefore be dismissed."

The collision was avoided, and the credit of the case of Lolley saved, by a reason that fails to commend itself to ordinary understandings. It certainly was a very hard case for this poor woman. She took the only redress against a great injury, which she could obtain, from the law of the country to which her husband had carried her. She returns to her na-

[1] Palmer v. Palmer, 5th July 1860, 2 Law Times, N. S., p. 88.

tive land, and there is told that the English Courts treat the American divorce as an absolute nullity; and then she asks, and is refused, the only redress which they think sufficient. To say that she was guilty of connivance because she complained of her husband as an adulterer in an American court of justice, is one of those surprising things, that one meets with in reading the dicta of English lawyers, and which to other minds seem paradoxes, that can only be explained on the ground of some *arrière pensée*, which prevents the court from fronting the facts.

Scottish divorce treated as null.

Tollemache v. *Tollemache*, decided on the 9th of July 1860[1] in the Divorce Court of England, was a case where an Englishman married in Scotland a Scotch lady, against whom he obtained a decree of divorce in the Scotch Courts, on the ground of her adultery committed in Scotland. The guilty wife and her paramour then intermarried. The first husband apparently became suspicious of the validity of the Scotch decree of divorce, it having been found that, at the date of that decree, his domicile was in England. He therefore petitioned the English Court for another decree of divorce, which was granted—the following being the only reason assigned:—"Sitting here as an English Matrimonial Court, we cannot recognise that divorce as putting an end to the marriage bond of a *domiciled* Englishman." And this is all; and in nearly the same words all of these decisions were pronounced, as if their authors were stating, not the most disputed, but the most axiomatic, proposition in international law.

Practical result is, that doctrine of Lolley's case abandoned.

Such is the history of English decisions on this question since the case of Lolley. The practical result is, that that decision as reported, and as understood by the men who pleaded it, is no longer law even in England. It has been, however, used as authority for another doctrine—at least by English lawyers—which, in its turn, is dissented from in Ireland. It is unfortunate that, in the case of Dolphin *v.* Robins, Lord Brougham was silent. We can well surmise how he would have treated the question, when we look at his great judgment in the case of Warrender, which gave the *coup de*

[1] 2 Law Times, N. S., p. 87.

grace to the doctrine of "indissolubility,"—a decision justly held as one of the finest specimens of forensic eloquence, of exact and logical reasoning, and of exhaustive learning, which our times can furnish. From the day on which it was delivered, the "indissolubility" doctrine began gradually to fade away. It is truly now a *nominis umbra.* Indeed the establishment of a Divorce Court in England would have reduced the doctrine to a practical absurdity. Before that Court was called into existence, Lolley's case declared that no foreign tribunal could dissolve an English marriage, and this, irrespective of the domicile at the date of the divorce. The power now conferred upon the *English* Divorce Court, confers no new powers upon *foreign* tribunals. Suppose, then, an Englishman went to America, or to Denmark, or to Scotland, and in any one of these countries acquired a domicile, and there committed adultery, the foreign court could not, according to Lolley's case, grant redress by a divorce which would have validity in England; and the English Courts could not do so (if the rule as to domicile which they apply to Scotch decrees be sound), because, at the date of the decree, there was no domicile in England!!

The time has, therefore, come for the English Courts to robe themselves in the dignity of a graceful repentance, and in the presence of the profession in Europe and America to admit their error. It will be shewn hereafter, that as great jurists as "the twelve Judges of England" have been brought to this result, so painful, yet so honourable to human nature. In no branch of jurisprudence during the last fifty years has there, indeed, been a greater advance than in private International Law; and there is no discredit in admitting, that in such a shifting science, there may have been mistake.

No argument in England as to jurisdiction *ratione delicti.*

III. Yet the decisions which have followed the case of Lolley are all as open to question, though upon a different ground. The point of view from which they have regarded the Scotch and American decrees of divorce, has prevented the English Courts from observing the main ground upon which these decrees can be defended. In not one of the cases has there

been any argument in reference to a circumstance upon which, according to jurists, the validity of such a decree is maintainable. The law of the place where the adultery was committed, or where the desertion took place, appears never to have been pleaded, as of itself sufficient, to give the Court that pronounced the decree, jurisdiction. It was hastily assumed, that the sole rule to be looked to was the law of domicile.[1]

It will be observed that the nature of the collision between the English and Scottish Courts has been entirely changed. Formerly the English position was the plain, intelligible ground that no court on earth could dissolve an English marriage. *Now*, the ground taken up is, that a foreign tribunal is not a *forum competens—where there is no domicile.* The controversy is thus brought to a lower platform, and allows the introduction into the discussion of elements of exceeding importance; for the moment it is admitted that an English marriage may be dissolved by a foreign tribunal, it becomes a fair question of expediency as to the competency of Courts, and one in regard to which others than lawyers are entitled to be heard.

The various grounds of jurisdiction by law of Scotland.

The law of Scotland recognises various grounds of jurisdiction. In pecuniary transactions they are more numerous than in questions of status. For example, in a question which has no reference to status, the arrestment of the goods or money of a foreigner in this country will give the Court jurisdiction,[2] a rule which we have borrowed from the commercial nations on the Continent. But this rule, based upon commercial convenience, is confined to pecuniary transactions, and it was accordingly determined that it did not give jurisdiction in an action of declarator of marriage.[3]

Jurisdiction in Divorce Cases.

In regard to divorce, the Scottish Courts have exercised jurisdiction—1st, *Ratione domicilii;* 2d, *Ratione delicti;* 3d, *Ratione originis.*

In regard to *domicile* nothing need be said, because all

[1] I state this, with the qualification, that Mr M'Queen in his recent Treatise has discussed the question, and solved it in favour of the Scottish view. See *infra.*

[2] Lindsay *v.* London and North-Western Railway Co., 3 M'Queen, p. 99.

[3] Scruton *v.* Gray, Mor. Dict. p. 4822.

parties may now be held to be agreed, that if the defender has his or her domicile in the country where the suit is brought, a valid decree of divorce may be granted. There is, however, a dispute in regard to the character of the domicile. The Lord Chancellor says that it must be the domicile of *succession*. How far this is either sound or expedient will be considered hereafter.

Jurisdiction in divorce *ratione delicti*.

The second case is that of jurisdiction by reason of *delict* in the country where the action of divorce is brought. Whether this be a ground of jurisdiction according to Scottish law, has been made a matter of question in a case now depending before the Second Division of the Court of Session. I abstain, therefore, from stating the authorities upon which I hold that, in such circumstances, the Scottish Courts have jurisdiction, though the defender be a foreigner. It will be sufficient here to give the rule as to *delicts* and *quasi delicts* generally, as stated by Balfour, one of the Judges of the Consistorial Court at the Reformation, and afterwards President of the Court of Session. "Gif ony persoun havand or not havand ane dwelland place without the jurisdictioun, committis spulzie, *or ony other trespass*, within the jurisdiction of ane uther judge for the quhilk he may be callit and convenit in judgment, he may be persewit be ony havand intres (interest), befoir the judge of the said schirefdom, or jurisdiction *ratione rei de qua agitur*."[1] I do not see how upon any other ground many decisions in cases of divorce that have been pronounced during the last three centuries, by the Consistorial Courts of Scotland, can be explained.

But, since my object at present is not so much to write a treatise upon international law as expounded by the Scottish Courts, as to maintain an argument upon what the law *ought to be*, with reference to pending legislation, it is of little consequence to show in what manner these Courts have proceeded.

Definition of "Obligations" from which right of action arises.

Independent of domicile, jurisdiction arises from obligation, and the interpretation of this generic word I shall take from

[1] 23d June 1543, Tenent v. Lundie, Balfour's Practicks, p. 282.

the Institutes, 3, 14, § 1:—"Omnium autem obligationum summa divisio in duo genera deducitur; namque aut Civiles sunt, aut Prætoriæ. Civiles sunt quæ aut legibus constitutæ, aut certo jure civili comprobatæ sunt. Prætoriæ sunt, quas Prætor ex sua jurisdictione constituit, quæ etiam honorariæ vocantur." § 2, "Sequens divisio in quatuor species dividitur. Aut enim ex contractu sunt, aut quasi ex contractu: aut ex malificio, aut quasi ex maleficio."

Therefore a person incurs an obligation who has subjected himself to another (1) by contract, or (2) by wrong, or (3) by other circumstances (*facta*), which, though neither contracts nor wrongs, produced, by special provision of law, effects like those produced by contracts or wrongs. "Obligationes aut ex contractu nascuntur, aut ex maleficio, aut proprio quodam jure, ex variis causarum figuris." Justinian does not say, "ex quasi contractu; ex quasi delicto;" but "quasi ex contractu; quasi ex delicto." That is, they exist as if there had been a contract or a delict, *though there was none.* The results of the *facta* resemble those of a contract or wrong; but the *facta* themselves remain *facta* still.

Now, the man who incurs an *obligation* in any of these ways ought to be made to answer to every action which the obligation gives rise to, before the Judge of the territory where he entered into or made it.

Jurisdiction *in foro contractus.*

As to jurisdiction arising from contracts, and citation *in loco contractus*, the rule has never been more clearly stated than in the following words:—"Neque vero statutum, aut consuetudo loci, solos cives, et homines suburbiorum, veluti subditos statuentium comprehendit; verum etiam forenses ac extraneos, dummodo hoc posteriore casu duo interveniant cumulativé, puta quod forensis in loco statuti executivi contrahat, ac post moram in loco contractus, sive in persona, sive in rebus suis, reperiatur; extranei namque venientes in alienum territorium, si quid negotium ibidem gerant contrahendo, vel quasi, censentur ratione facti sui ibidem celebrati, eodem jure quo populus territorii."[1]

"In contractibus forum speciale est locus contractus, qui

[1] Collerus de processibus executivis, Par. I. cap. 3, No. 179.

duplex est, in quem destinata solutio, vel in quo contractum est."[1]

This is the rule of the common law of Germany.[2] It is also the rule among other Continental States,[3] and is held not merely as to *contracts* in their literal sense, but as to *obligations* in the comprehensive signification of the Institutes.

This is not an exception to the rule *actio sequitur forum rei*, but is a general rule itself, and had an existence in the codes of civilised nations as a general rule, and as the first ground of jurisdiction. It is according to the rule of reason founded on the common rights and interests of mankind; and yet it is this rule, supported by the concurrent opinion of successive generations of lawyers of all countries, that is now proposed to be summarily abolished.

The grounds on which it may be defended are apparent on the surface. Let us first take the case of *contracts*. If an Italian come to Scotland, and buy 100 head of cattle, and take delivery, it certainly would be hard to compel the Scottish creditor to seek his Italian debtor in his charming *entresol* at Capua, and institute an action before a Neapolitan judge. It may be that the goods of the Italian are in Italy,—but he himself is, in Scotland, when sued. The witnesses to the bargain are there; the law according to which the validity of the contract must be determined is that of Scotland. The Italian Court, in order to do justice, must remit to Scotland an order to ascertain what is the law of that country in reference to the contract of sale; while, on the other hand, if the suit were entertained in a Scottish Court, this expense would be saved, and so would also that of carrying the Scottish witnesses to Naples.

Necessary that defender be sued within the jurisdiction.

According to Mr Burge (vol. iii. p. 1018), the Roman law did not require anything further to constitute such a jurisdiction, than the single fact of the contract being entered into within the territory of the Court. But this opinion as to the Roman law, is contrary to the general opinion, which is, that

[1] Brunneman Comment. in Cod.

[2] Revue Etrangére, vol. v. p. 695.

[3] See Felix, 352, who refers to the various Codes.

that law farther required, citation to be given personally to the defender, within the territory of the Judge. If he had got across the Border with the cattle before citation, the creditor must follow him to his domicile. But, assuming Mr Burge's statement to be correct, there was a plain difference, between the condition of nations in the days of the Roman Empire from what they are now. There was then but one people, and it might not be unreasonable to say that any Roman citizen, might be sued before any Roman Court, within the territory of which he had entered into a contract. But, when the Roman Empire fell, and Europe was changed into a number of independent nations, the case became very different; and it is now required that, besides the fact of contract, there shall also be personal citation in the country of the contract.[1]

Upon this matter of contract, the Courts of Scotland have never varied in their decisions. I shall refer to two only that most strikingly illustrate the rule. An Irishman married a young woman at Paisley, and was cited in Scotland in an action of declarator of marriage. The Court sustained the jurisdiction *ratione contractus*, and of personal citation in Scotland.[2] Again, a man domiciled in England when the action was raised, had promised marriage to a woman in Dundee, which he would not fulfil. Being casually in Dundee on a visit several years after the promise, he was cited in an action of damages; and the Court, on the same grounds, sustained the jurisdiction.[3] The principle thus given effect to was laid down as the law of Scotland three centuries ago, by the oldest text-writer on Scottish law.[4]

Defence, of jurisdiction *ratione delicti.*

Now as to *delicts*,—Is not the same reason applicable for sustaining the jurisdiction of the locus? There are three actions which may be raised in consequence of adultery. 1*st*, A criminal prosecution. 2*dly*, An action of damages against the wife's seducer. 3*dly*, An action of divorce.

[1] Voet, 5, 1, sect. 73-4.

[2] Key v. Burnet, 7th March 1780, reported in 1 Fraser, Pers. Rel. p. 695.

[3] Sinclair v. Smith, 17th July 1860. Sess. Cas.

[4] Balfour, Practicks, p. 282.

As to the first, it is settled according to the law of nations that the Courts have power to *punish*, for crimes committed by foreigners within their bounds. This at least is a fixed point on the field of controversy.[1] In the second case, if the seducer be a foreigner, who commits adultery with a Scotch woman, it seems a mere mockery to say that the injured husband must follow him to other countries and claim damages there. The foreign Court may not even allow this kind of redress for conjugal infidelity. Caught red-handed in the fact, the foreign paramour must answer before a Scottish civil jury, for his injury to the husband. The remaining action is divorce; and it will be found that all the reasons for recognising the jurisdiction as to the other two, concur also in favour of it, here. The rule, and the reasons for it, are well stated in the 69th Novel of Justinian (chap i.), to which, as being too long to cite, this reference may be sufficient.[2] Huber states it in general terms in a work of his which is seldom cited:—"Proinde, qui ad tempus in quibusdam locis agunt, fixo alibi domicilio et sede fortunarum suarum, an hi apud diætas suas temporarias conveniri non possunt? Si posse dicas, frustra domicilium esse causam fori statuas; si non poterunt, videndum, ne res arguat contra; cum peregrini etiam in locis, ubi reperiuntur, conveniri soleant, et forum eligere cogantur, ubique gentium; juxta regulam decantatam,—*ubi te invenio ibi te judico.*[3]

Suit for divorce concerns public order.

The Lord Chancellor, however, says that a "suit for divorce was a mere civil proceeding." To be sure it is. Adultery gives several rights to the injured spouse; and they must arise from one or other of the four categories of law above named, or from the innominate contract of *facias ut facio.* In whichever way adultery is regarded, it is a fact or thing done; and, according to the law of nations, satisfaction may be enforced before the Judge of the territory where it took place. It must also never

[1] 2 Felix, 287; Martens, sect. 99; Voet de Statut., sect. 11, c. 1, N. 1; Hert. sect. 4; Kent, vol. i., p. 36; Story, sect. 620; Wheaton, vol. i., p. 158.

[2] See also Savigny, vol. viii., p. 239, and the ordinary Commentators on the Digest, lib. v., tit. i.

[3] Huber de jure Civit, sect. 2, chap. iii., N. 9.

be forgotten, in considering this question, that law is, or ought to be, but morals applied to the circumstances of private individuals,—and though divorce be a remedy to the individual, it is also something more. It is a matter (as Story puts it) affecting "the public order and economy, the promotion of good morals, and the happiness of the community."[1]

Put the case that a Hungarian committed adultery in Scotland, and that in Hungary the wife could obtain divorce. It is true that in this case, the Hungarian Court would not be obliged to resort to Scottish lawyers, as in a case of contract, in order to ascertain whether adultery had been committed. It is a simple question of fact. But although the expense of examining Scottish lawyers would be saved, the unfortunate wife would be obliged to carry Scottish witnesses to Hungary to prove her case. If the suit were before a Scottish Court, the witnesses are at the door. Certainly the rule *locus regit actum* is here more convenient, and would more readily promote the ends of justice than the rule *actor sequitur, &c.*

Cases of foreigners with prolonged residence, though not domiciled in Scotland.

The error under which Englishmen seem to labour is, that there are no foreigners in Scotland—(they are foreigners to our laws)—except themselves. There are, however, others than Englishmen, who make Scotland the land of their sojourn. We extend hospitality to numbers of Italian, Hungarian, and Polish exiles. Each of these unfortunates has a home and country different from ours. By Babel's streams, they still think of the Temple. They refuse to be buried in the grave of great hopes; and though a Pole may not dream of the resurrection of his country, he will not renounce his nationality, or his hope of being gathered to his fathers upon the banks of the Vistula. These men dwell in Scotland, for ten or twenty years, and are never domiciled as regards *succession*. There is, no doubt, the fact of residence, but not the animus. Is the *Scottish* wife of a Polish Count—now teacher of languages—to be remitted to the Courts at Warsaw—who would not perhaps hear her, because her husband is an outlaw? Must she continue, in Scotland, for twenty years, the wife of a man who lives in notorious adultery? Must the sense of decency of Scottish people be outraged for ever

[1] Story, p. 347.

by such a spectacle of wrong? Are the Scottish Courts entirely powerless, so that they can neither give to the unhappy wife the redress allowed by the laws of Scotland, nor even administer to her the remedy of the law of the Polish domicile? We do not, in giving her relief, reverse any of the natural laws of married men and women. We simply remedy the unnatural relations, of those whose married life would otherwise be hopelessly and helplessly wretched; and separate persons, whose only tie is that which binds the victim to the oppressor, the injured to the wrong-doer.

How far is the contrary doctrine to be carried? Are we to adopt it as the law of a civilised state, that a woman resident among us is without redress, though married to a man faithless and cruel, who, not content with the sin of adultery, adds to it the cowardice and barbarity of personal violence? Under all degrees of sin, shame, and suffering, can the law of the residence give no real, and offer no enduring shelter? If the Polish exile should alternate his moments of depression, in consequence of his misfortunes, by hours of brutal usage towards his wife, she must have some further remedy than the police-office. The future must be provided for by a judicial separation, and a decree for alimony. We recognise in them the status of a married pair; and we are therefore entitled to exact from both of them the discharge of the duties of the married relation. The recognition of their status implies the co-relative obligation of submission to their duties,—and to the enforcement of them,—by the law which protects them. It would be a hard thing to say that if this Polish magnate, deserted his wife *in Scotland*, for ten years, we could not grant a decree of divorce for desertion, merely because he had still retained his domicile of origin. "On ne peut rejeter de ce temple sacré, des etrangers malheureux qui viennent, avec tant de confiance reclamer la justice."[1] All laws have a double action; they derive some of their virtues from the temper of the people that possess them, and they react in some degree upon that temper. It cannot be disputed that it has been the temper of Protestant Scotland for three centuries, to relieve an innocent person, from the bur-

[1] Merlin, Questions de Droit *v.* Etranger.

den of marriage with an adulterous wife or husband, who commits the sin in Scotland. The reasoning which a French writer employs against the decisions of his country, in cases of judicial separation, is apposite. "This demand has for its basis new facts, foreign to the marriage, accomplished on French soil, under the eye of French law, important to morals, to public order, to the domestic government of families,—touching thereby, as well as by the *eclat* of the affair and habitual notoriety of these facts, the police laws of the country. These facts, thus necessarily fall, under the action of the law of the land, where they are done."[1]

In this as in almost everything else, there are "three courses" open. The courts of justice are only bound to recognise the laws of foreign nations in such a way as may be consistent with their own juridical policy or interests, and they may, in like manner, only interfere, in adjusting the disputes of foreigners, according to general considerations of national advantage. They may, in the *first* place, refuse to take cognisance of any dispute whatever between foreigners resident within their territory; or, *secondly*, they may entertain the question, and decide it according to the *law of the domicile* of the parties; or, *thirdly*, they may entertain the action, and decide the matter according to the law of the forum. Each of these several cases is illustrated by the example of nations at the present time, indicating that "there is no uniform and constant practice of nations as to taking cognisance of controversies between foreigners."[2]

Case of absolute refusal to hear complaints between foreigners.

The first case of absolute refusal to administer justice to a foreigner is one so repugnant to all ideas of natural justice, and so contrary to the practice of the Scottish Courts from the earliest times, that I do not intend to dwell upon it. Strange to say, the most conspicuous example of its working is to be found in the French empire;[3] and still more strange is it, that it is not the result of the hasty enactment of a despotic power, but was introduced into the laws of France, at a time when that

[1] Mailher de Chassat, Traité des Statuts, p. 270.
[2] Wheaton on the Law of Nations, p. 191.
[3] Felix, sect. 151, vol. i. p. 293.

country had writers on jurisprudence, who have given laws to mankind. Boullenois states it,[1] and the Code Napoleon, though chargeable with many invasions upon international law, cannot be blamed for this one. If foreigners in France be not domiciled by special license, the courts of justice in that country have no jurisdiction over them in any question of status (*Felix*, sect. 158). Even in cases of contract, the French Courts refuse to interfere, if the contract have been made in a foreign country, though the defender be resident in France.[2] A judicial separation has been refused (*Felix*, sect. 158). An action of declarator of nullity of marriage contracted in a foreign country, has also been dismissed on the ground of incompetency. The French Courts will not even entertain an action by a foreign wife to compel her husband to consent to "an act of civil life," nor allow a foreign father, to state an objection to a marriage, which his daughter proposed to contract in France.[3]

Now, what is the judgment pronounced upon such arbitrary rules by Frenchmen? "We persist in believing," (says Felix, sect. 157), "that the French jurisprudence, in refusing to entertain actions between foreigners not domiciled in France, is contrary to the law of nations, admitted by the other nations of Europe, and prejudicial even to the interests of the French people, who, by way of retorsion, will be excluded in foreign countries from the right of pursuing their debtors, not belonging to these countries, in the territory in which these debtors are resident. I have seen cases where that retorsion has been exercised."[4]

Mons. Felix has not seen such cases, at least in Scotland. We do not visit the illiberality of his laws, by equal illiberality on our part. The Courts of Scotland are open to all alike, and foreigners and natives have the same justice.

[1] Vol. i. p. 607. He also defends it, p. 608.

[2] Code Civil, Arts. 13, 14, 15; Code de Commerce, Art. 631; Pothier, Pro. Civile, Par. i. c. i. p. 2.

[3] Merlin, Repertoire v. Etranger, sect. ii.; 1 Felix, sect. 146; De Chassat, p. 263. This author gives the cases subsequent to those reported by Merlin.

[4] And see 1 Felix, sect. 146.

The editor of the work of Felix (Charles Demangeat), in a note to the above passage, thus expresses himself in regard to questions of status (p. 309):—"The French tribunals ought, in regard to foreigners simply resident in France, to be more disposed to entertain actions of judicial separation than those referring to merely pecuniary interests. Indeed, the necessity of cohabitation may become either a danger to the wife, or an occasion of scandal. It is in the true interests of public order that our tribunals should put an end to that necessity, by pronouncing for a judicial separation."

Reasons for hearing suits between foreigners not domiciled.

This is the true ground upon which this question ought to be determined. Is it for the interest of the public that the foreigners, to whom we extend the protection of our laws, should abuse them with impunity? Grant it, that laws are made, in the first instance, for the subjects of the realm, yet their object is the preservation of public order and the administration of justice between individuals; and foreigners who voluntarily take up their residence among us, cannot be allowed to do things that are not permitted to natives. The *criminal* law will not tolerate a plea in bar of the jurisdiction of our courts; but the criminal law does not reach every act which shocks public decency, or is not consistent with our social institutions. As much scandal would be committed, by allowing a foreigner to treat his wife with cruelty, or to live in open adultery, as would be effected by a petty theft.

Instead of adultery, let us put one of the cases stated in the Institutes as an example of *quasi delicts* (*Inst.*, 4, 5, 1), viz., the throwing something from a window abutting on the public way, by which a passer-by is injured. The "*actio in factum*" was competent to the person injured (sect. 3). Now, if the offender in this case were a domiciled Englishman, is there any reason for maintaining that he ought not to be sued in the civil court for the damage he had done? And what is the difference between this case, and that of the foreign seducer of a Scottish wife who is sued for damages? And if the action be good against him, why may not the wife of a foreigner resident in Scotland appeal to the tribunals for divorce (the only remedy allowed *her*) against her foreign resident, but not domiciled, husband?

Law of Scotland regards divorce as a vindication of public order and decency.

The ground upon which the law of Scotland grants redress to one of the spouses for a breach of conjugal duty committed by the other is not, as Lord Campbell seems to suppose, merely in order to redress a private wrong. The view of Story above quoted, is that of the Scottish law. Adultery is a capital offence; and any Englishman who came to Scotland and lived in notour adultery might, according to the letter of our existing laws, expiate his offence upon the scaffold. In order that there may be no doubt upon this matter, I shall here cite the statement of our institutional writer upon criminal law:—"Yet I think there is no room to doubt of the wisdom of our law, when it places this high breach of moral and social duty in the list of crimes, instead of classing it, as seems to be done in the English practice, in the rank of a mere civil trespass, and applying the feeble censure of an award of damages,—a sort of amends not very suitable to an injury of this kind, which breaks in so deeply on the happiness of private life, and the welfare of a family, as well as on the interests of decency and public order. For, even in those who are not corrupted by the example of infidelity, it still tends to weaken, in some measure, that delicate and jealous sense of honour, which is the surest protection of female virtue.

"What though the forfeit of the law is not exacted in every instance? It nowise follows that it is therefore a useless law, or without a salutary influence on the manners of the people. The transgression still retains its degree and character, as a known article of our penal code; and to have been guilty of anything of this description must always, with the respectable part of the community, be attended with so much the more shame on that very account. And to this provision of our law it was perhaps, in a great measure, owing (a thing not a little honourable to our practice, and which it were to be wished that we had still to boast of) that, down to a late period, the notion of this high wrong, as commensurable with damages, or a pecuniary *solatium*, had never been heard of in any civil court.

"Our oldest ordinance against adultery is the Act 1551, c. 20, which passed before the downfall of Popery. It is directed only against a common and an incorrigible adulterer; and

orders that he shall be put to the horn, and suffer the ordinary consequences of that sort of rebellion. But the next statute, that of 1563, c. 74, which passed in the very heat of the Reformation, makes a wide step, and at once applies the curb of the highest pains of law to this 'abominable and filthie vice and crime of adulterie, which has bene perniciously and wickedly used within this realm in times bygane.' It enjoins the execution of all former laws made for the case of simple or unaggravated adultery; and as for 'all notour or manifest committers of adulterie in onie time to cum,' it orders that they 'sall be punished with all the rigour unto the death, as weil the woman as the man, doer and committer of the samin.'"[1]

Our forefathers so regarded it, and so punished adultery; and if injuries are to be estimated by their evil consequences, there is none more aggravated than this. It is the irretrievable ruin of the woman; it contaminates even her very family with a taint which no virtues on their part can wipe away,—which the jealousy of a brother's honour will do its best to remove, and which throws suspicion on a sister's purity. It destroys the name and relation of husband and wife, and often weakens even the obligations of parental love. To tolerate it, is to permit the permanent exhibition of an example, which will taint society. The liability of the adulterer to private revenge was the law of Athens and of Rome, and is sanctioned by an express constitution of Justinian; and in modern days, the putting him to death, when caught in the act, is justifiable homicide.

It is no doubt true that, in modern times, public opinion has not required the Lord-Advocate to prosecute criminally the committers of adultery. The crime, though heinous, and involving in it, as regards the seducer, both perjury and fraud, is not one, that the sentiment of our times, would wish to be visited with capital punishment. The person most injured is the innocent spouse; and if he or she get freedom from a hateful bondage, the rest of the punishment is left to the reprobation and contempt, with which society pursues the adulterer. But let a law be passed which shall render it impracticable or impossible, to obtain relief by divorce, and then

[1] Hume on Crimes, vol. i. p. 453.

inevitably the reaction will come, and the Lord-Advocate will be called upon to put in motion, a machinery that will obtain divorce in a more unpleasant form. Our present system, which dissolves the marriage of an Englishman for his adultery in Scotland, may not be agreeable south of the Tweed; but the hard expressions which are used towards our law in this matter, would receive no small modification if, instead of being divorced, the adulterous Englishman were hanged. Suppose the Lord Chancellor carried his clause to-morrow, can there be the least doubt that this loophole of relief being stopped up, a new one would be found, under the existing law, the propriety of enforcing which, in such circumstances, would be less open to question than if it were tried at present.

That divorce is a matter to be granted in *loco delicti* as affecting "the public order and economy, the promotion of good morals, and the happiness of the community," is a doctrine which received the sanction of Lord Brougham in the case of Warrender.

"Suppose we now take another, but a very obvious and intelligible, view of the subject, and regard the divorce not as a remedy given to the injured party, by freeing him from the chain that binds him to a guilty partner, but as a punishment inflicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch Acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every State has the right to visit offences with such penalties as to its legislative wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so, in certain cases, still by the letter of the Scotch law. Whoever committed it must have suffered that punishment had the law been enforced, and without regard to the marriage of which he had violated the duties having been contracted abroad. Indeed, in executing such statutes, no one ever heard of a question being raised as to where the contract had been made."[1]

This view of the matter is not a peculiarity of the law of Scotland, but is given effect to also in the Courts of America. In

[1] 2 S. & M'L. 205.

the Supreme Court of Massachussets, the following exposition was given:—"Regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil code, and apply not so much to the contract between the individuals as to the personal relation resulting from it, and to the relative duties of the parties, to their standing and conduct in the society of which they are members, and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community. A divorce, for example, in a case of public scandal and reproach, is not a vindication of the contract of marriage, or a remedy to enforce it, but a species of punishment, which the public have placed in the hands of the injured party, to inflict under the sanction, and with the aid of the competent tribunal; operating as a redress of the injury when, the contract having been violated, the relation of the parties, and their continuance in the marriage, shall have become intolerable or vexatious to them, and of evil example to others. The *lex loci* therefore by which the conduct of married persons is to be regulated, and their relative duties are to be determined, and by which the relation itself is to be in certain cases annulled, must be always referred, not to the place where the contract was entered into, but where it subsists for the time, where the parties have had their domicile, and have been protected in the rights resulting from the marriage-contract, and especially where the parties are or have been, amenable for any violation of the duties incumbent upon them in that relation." [1]

Divorces prosecuted by Procurator-Fiscal.

Besides punishing the adulterer as a criminal, the law of Scotland has gone farther, and sanctioned the interference of the public prosecutor in instituting a divorce. Until the abolition of the Commisary Court of Edinburgh in 1830, it possessed a procurator-fiscal who watched over the morals of the community. This official had very varied duties. In matters of divorce they were peculiarly delicate. On the one hand, he had to see that no adulterer remained undivorced; on the other, the State required him to prevent divorce, without cause. He was more frequently occupied in opposing, than in prosecuting, suits for nullity and divorce. The tenaciousness of

[1] Per Justice Sewall, in Barber v. Root, 10 Mass. 265.

right which invigorates a defender in ordinary suits, is generally awanting in cases of divorce. The litigious spirit is here weak, and often the defender is as anxious as the pursuer for a successful issue to the suit. He or she, instead of a real adversary, is a willing victim of the law.

In the case of Paterson v. Johnstone in 1575, the proceedings of the procurator-fiscal may be very clearly seen. The case is remarkable as the nearest case (until recent days), which has occurred in a Scottish Civil Court, relative to marriage with a wife's sister.[1] In another case the procurator-fiscal obtains decree in an action charging with bigamy and adultery the defender, who also is punished by the Judge. (Riddell, *Peerage Law*, p. 460); and Mr Riddell's comment on this case is, that "Differently from English practice, a divorce was here effected at the instance of the procurator-fiscal, who pursued *ad vindictam publicam*, and not at that of any of the parties, who appear to have been in a state of happy acquiescence with their anomalous condition, and quite undesirous of moving."

[1] "Anent ye actioun and caus perseuit befoir ye saidis Commissaris be Maister Henry Kinross, ye Fyschall (*word illegible*) for our Lord, within ye commissariot of Edinr, againis Thomas Paterson and Cristian Johnstoune; Be vertew of ye saidis Commissaris precept direct yrupon; makind mention that quras he is informit that Thomas Paterson, in (*word illegible*) in ye moneth of Februar or yrby, the yeir of God 1558 yeiris, mareit in ye face of ye kirk umquhile Janet Johnstoune, syster to Robert Johnstoune, in Walterheid, remaineit with hir yrefter in mutuall cohabitatioune be ye space of divers yeiris, and procreat betwix yame sindrie bairnis; and yairefter ye said Thomas, the said umquhile Janet beand deceist, contrackit meriage of new, and in pretendit maner solemnizat ye same, with Crystian Johnstoune, dochter to ye said Robert, brother to ye said umquhile Janet, the said Crystian beand attingent to ye said umquhile Janet in first and secund degries of consanguinitie; the quhilk last pretendit meriage was, of the law of God and man, onleisom.

"The qlk pretendit last meriage aucht and suld be declarit to haif bene fra ye begynninge, and to be in all tymes cuming, null and of nane avail.

"The saidis Commissaris declaris the said pretendit meriage maid betwix ye said Thomas and Crystian to haif bene fra ye begynning, and to be in all times cuming, null and of nane avail; Becaus ye said precept being be ye saidis Commissaris admittet to ye said Mr Henrye his probatioune, and diverse termis assignit to him for proveing yrupon, he provet ye same sufficientlie, as wes clearlie knawin to ye said Commissaris."—*Excerpt from Commissary Records, preserved in the Register House, Edinburgh*, Vol. 7.—26th July 1575.

If, therefore, it be right and proper to interfere with adulterers in Scotland, according to what law ought the Scottish Courts to decide? This brings me to the "second course," Shall it be according to the law of the forum (Scotland), or shall it be according to the law of domicile? Is an Italian or a Pole entitled to plead in the Courts of Scotland, the law of his native land, which regulates his succession, and carry abroad with him wherever he wanders, as it were, a whole code of personal laws? The Roman citizen carried with him his rights of citizenship, and might plead in all the courts of the world *Civis Romanus Sum.* "But this was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had fixed upon mankind."[1] But, after the fall of the Roman Empire, it *was* reduced to a legal principle. The history of the personal laws during the Middle Ages has been given us by Savigny. The barbarian conqueror in his civil rights could appeal to his own laws. The fallen Roman, in like manner, was judged according to the *Corpus Juris Civilis*, which (notwithstanding the Amalfi fable) was still recognised as the jurisprudence of the Roman people after the extinction of their empire. "In the same district," says Savigny, "in the same town, the Lombard lived under the Lombard law, the Roman under the Roman law. The characteristics of personal laws are equally visible in the individuals of the different Germanic tribes; and the Franks, the Burgundians, and the Goths, lived on the same soil, each under his own law." In a letter from Agobardus to Louis le Debonnaire, cited by Savigny, he says, "We often see talking together five persons, of whom no two obey the same law."[2]

Ought the law of the foreign domicile to be applied by Scottish Courts in Divorce.

A system like this, whereby social, or at least commercial intercourse, became impossible, was abolished in some places sooner than in others. The territorial principle of jurisdiction gradually triumphed. The principle that the law binds all alike—*lex uno ore omnes alloquitur*—asserted its supremacy;

[1] Per Lord Brougham, 2 Sh. and M'L., p. 207.

[2] Savigny, Geschichte des Römischen Rechts, ch. iii

and the only exception to it in modern days, is to be found in the peculiar and anomalous position of the Indian and African races, in India and America.

It is now surely too late to insist upon the revival of a system like this. We cannot take cognisance of the laws of divorce either of England or of Otaheite. We cannot grant judicial separation according to the causes, or the forms, or carry out our sentences to execution in the mode, of the courts of these enlightened countries. If a wife be ordained in Scotland to adhere to her husband, and she refuse to do so, the Court cannot send its officers to carry her to her husband's bosom.[1] In England, after a decree in an action of restitution of conjugal rights, it seems that force may be applied, in order to compel the married pair to live, at least in the same house.[2] If we administered the law of England, it would require to be in its entirety—a course for which we have no machinery whatever, and which would entail endless confusion.

Divorce should be granted according to law of forum.

The last and third course, therefore,—the one hitherto pursued in Scotland,—is the only solution of this difficult problem. Let us, without reference to birth-place, or contract, or domicile, speak to foreign adulterers as we would to natives, and give to a foreign refugee, not merely protection from his own regal tyrant, but from the enemies within his own household. Once we get rid of the arbitrary dogma, that conjugal rights and all violations of them, must depend on domicile, there is no difficulty in the matter. If we did not set aside this dogma, we should be reasoning in the old manner of the schoolmen, by first framing a theory, and then making experience bend to it. The inductive philosophy is absolutely set at nought when we decide a matter which is to be regulated by expediency, according to a rule framed irrespective of experience. If the Scottish Courts are not to remain helpless—ignoring the existence of foreigners within their territory—if the religious feelings of the people and their moral sympathies are not to be outraged by the permission of a scandal, for which redress is given to natives—if it is simply a denial of justice to tell the wife of a foreign refugee

[1] Colquhoun v. Colquhoun, M. App. v. Husband and Wife, No. 5.

[2] Orme v. Orme, 2 Add. 384; Forster v. Forster, 1 Hag, C. 154; But see M'Queen, Divorce Jurisdiction, 2d ed., p. 313.

in Scotland that the Courts of her husband's far off land are open to her—if, in short, we must do something, then, plainly, that must be, to administer the remedy of the Scottish laws. And, according to the law of nations, every foreign court should recognise and uphold the judgment. As we shall see immediately, the Divorce Court of England is not slow to assert a jurisdiction in cases where the Scottish Court would draw back. It has had as yet a brief career; and no question, such as I have been considering, seems to have come before it. When a Scotsman shall go to England, and there commit adultery, and there be sued before that Court, the learned Judge will then have an opportunity of considering a question which, so far as I have seen, has never been decided.

Would English Divorce Court assert jurisdiction *ratione delicti.*

If we may judge of the future by the past, we may easily anticipate the decision.[1] The Divorce Court of England has only been in existence for three years, and yet a Bill was introduced by Sir F. Kelly into the House of Commons, the effect of which would have been to subject Scotsmen, in cases of legitimacy, to this English jurisdiction. It was well enough for the English to borrow from us our action of declarator of legitimacy, but it was another thing altogether to propose to subject the Scottish people to an English tribunal. The Consistorial Law of Scotland is the oldest portion of our jurisprudence. It was matured at a period when our history fades away into vague tradition. It was a code of laws, before the institution even, of the Court of Session. It has remained unchanged down to the present hour, except in that almost universal change effected in Protestant countries at the Reformation, of allowing divorce *à vinculo*, and in restricting the prohibited degrees. The decisions of 600 years ago are precedents for the Consistorial Courts of Scotland at this day. Actions of declarator of legitimacy were familiar suits in the times of Robert Bruce; and Scotsmen, therefore, were surprised at hearing, in the year 1858, that it had occurred to an English lawyer, for the first time, to give to the Scottish

[1] The latest English lawyer who has written upon this subject has stated what, in his opinion, would be the decision of the English Court.—(M'Queen on the Law of Divorce, p. 246, 2d edit.) He is of opinion that the English Court would sustain its jurisdiction.

people the benefit of such an action. The new Divorce Court of England was to have its powers extended to the north; and, as Lord Belhaven said of some similar proposal at the time of the Union, "the puddock stool of a night was to push aside the cedar of ages."[1] This English Court has acted in consistency with these views. It has stretched out its hands over people and countries, where, as shall be hereafter seen, there would be some difficulty in justifying its interference according to the law of nations. It would find far less difficulty in getting the assent of foreign tribunals, to a decree of divorce pronounced against a foreign adulterer temporarily resident in England, in which he had committed the conjugal offence, than to some of its recent decisions. I take leave to say, that if such a sentence were pronounced by an English Court against a Scotsman, and the validity of Sir C. Creswell's decree were thereafter called in question in a Scottish Court, it would be examined with a courtesy which the *comitas gentium* demands, and with reasons for the judgment, that English Courts have not condescended to give, when they annul the decrees of the Scottish tribunals. What might be the result of the challenge of such an English decree (which no doubt will one of these days be pronounced), I will not anticipate. At all events, the Scottish Courts would rise superior to the petty considerations of which Felix seems to have dread. There would be no injustice done, nor want of respect displayed, by way of "retorsion" to the English decree. There would be no acting upon that principle of reciprocity which seems to guide the juridical proceedings of some foreign tribunals, who proceed upon the footing, that "if you will be reasonable, I will be reasonable; if not, not." The Courts of Hamburgh, for example, will give effect to a foreign adjudication of bankruptcy, only if the law of the country where it was adjudged would recognise a Hamburgh adjudication. Hitherto the Scottish Courts have not acted upon this illiberal view; and this is not the age at which they will take a step to the rear. Even while the New York

[1] The Bill passed (21 & 22 Vict. c. 93); but it was, on the remonstrance of the Faculty of Advocates, confined to England and Ireland. They were obliged, in order to get this effected, to have recourse to the Treaty of Union, which is sometimes of use still.

decisions, refuse to recognise any foreign bankruptcy whatever, and are, therefore, in a lower deep than the Courts of Hamburgh, the law of Scotland gives effect to a New York adjudication of bankruptcy.[1]

The doctrine of "fraud" in procuring divorce.

But the Lord Chancellor favours us with another view of this matter, which is not novel. He refuses to recognise the jurisdiction of the Courts *in loco delicti*, because, he says, this would be allowing persons to perpetrate a *fraud* upon the law of domicile,—which he always assumes to be England. He apparently will not realise the idea that Scotland, as well as England, may be the *refugium peccatorum* from the oppressive governments of the Continent. But putting this aside, we have arrived at that stage in the history of International Law when the *in fraudem* doctrine is at the same low ebb, as the doctrine of indissolubility. The English lawyers are entitled to justice, by the admission, that for this doctrine they are not responsible. It originated either with Huber or the Voets—Paul or John.[2] At all events, they all give it the sanction of their great authority. In their books it might have remained as a mere speculative opinion, had it not been that Lord Mansfield, in a case relative to a bill granted for money won at play, threw out a *dictum* apparently in its favour.[3]

Sanchez, the greatest of all the canonists, who wrote before either Huber or the Voets, put the very case of fraud upon the law, and denied the rule deduced from it.[4] There was no class of cases more calculated to test the doctrine, than the marriages of English minors at Gretna Green, "We have it now," says Lord Brougham,[5] "firmly established as the law of the land, and duly acted upon by persons of every condition, that though the law of England incapacitates certain parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance,

[1] Bell's Com. p. 1294.

[2] P. Voet de Statutis, sect. 9, c. 2; J. Voet, 23, 2, 4; Huber Conf. Leg. sect. 8.

[3] Robinson v. Bland, 2 Burr. 1079.

[4] Sanchez de Matrimonio, lib. 3, Disp. 18, n. 29.

[5] 2 Sh. and M'Lean, p. 219.

without incurring any penalty, and to obtain its aid without any difficulty, in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the rule of infraction, or evasion arising to the English law, for supporting Scotch divorces, after having thus given to Scotch marriages the power of eluding and breaking, and defying that law for so many years."

The reason assigned by Sanchez against the doctrine is, that no man commits a fraud who does any thing which the law does not prohibit. *Qui jure suo utitur, non potest dici fraudem committere.* He puts the case of a marriage on deathbed which hurts the heir. Is that a fraud? No. "*Est enim fraus licita cum contrahentes utantur jure suo.*" Therefore, persons going to a country where the decrees of the Council of Trent do not prevail, with the sole view of evading their restrictions as to marriage, "*utantur jure suo;*" and their act cannot be challenged. He says very justly, that *intentio maneat in mente;* and unless fraud be inferred from the act itself (which is utterly untenable), fraud can never be satisfactorily ascertained.

It is, with profound respect, very much like nonsense to say that a fraud can be committed upon a *law.* As a mere figure of rhetoric, the expression might be tolerated; but as the statement of a legal principle it will not bear investigation. If the law does not annul an act which any person has done, there is no fraud committed either against the law or the government. It may be that the *spirit* of the law has not been followed out; but this arises from the insufficiency of the law itself. Fraud can only be committed against individuals, or corporations, or governments; and as well might the phrase of "cheating the gallows" be regarded as the statement of a legal principle, as that which, Lord Campbell has once more called into vitality, by his approval. In questions of contract, therefore, this doctrine has disappeared from practical jurisprudence. It is useful merely as a figure of speech, when the orator requires to carry the argument of the moment to a clinch or an antithesis.

In what cases, would fraud be held established, and to what

extent is the doctrine to be carried, with reference to English people in England? Take the improbable case of an Englishman hating his wife, and desiring to get rid of her. For that purpose he commits adultery, not from any particular enjoyment in the act, but merely to provoke his wife to divorce him. Is this a fraud that would bar the wife from her remedy? Is the case different when an Englishman transfers the locality of his sin to Scotland; and would the nature of the act be changed, and fraud no longer exist, if he had not come to Scotland with the intention of committing adultery here—if, attracted by Scottish youth and beauty, he, during a vacation ramble, in a sudden access of passion, which overmastered him for the moment, and was followed by immediate repentance, commits adultery in Scotland? Virtue fell under the combined influence of passion and opportunity. *Pares ætate et viribus coeunt.* The foreigner did the deed without any intention that it should be followed by divorce. Under the cloud of night, and with every precaution for concealment, he gratified a momentary passion; and the last thing in the world which he wished was the discovery of it by his wife. Is this a case of fraud?

It is idle to prosecute this matter further. As a ground for legislation or judicial decision, this *in fraudem* doctrine may be returned to the storehouse of the commentators, from whence it came. It has passed away from existing things, except as marking a stage in the history of juridical delusions—and there let it rest.

No reasoning by English Courts in support of their views of jurisdiction.

When English lawyers insist upon domicile as the sole basis of jurisdiction in cases of divorce, and assume the responsibility of setting aside the decrees of foreign tribunals, they are bound to give to the world reasons for their conduct. The *ipse dixit* of an English Judge is not sufficient in the great republic of jurists; and yet one searches in vain through that roll of cases, from Conway *v.* Beazley to that of Tollemache, for any reason, except the *sic volo sic jubeo* of the court.

It has never been explained why the law of domicile should prevail before every other, when others have the sanction of expediency—the interests of humanity and justice—and the recommendation of a long antiquity, in their favour. There is

no doubt a legal rule which runs through several of the commentaries on this subject, every writer just having taken it from the other, to the following effect:—"Quando lex in personam dirigitur, respiciendum est ad leges illius civitatis, quæ *personam habet subjectam.*"[1] The whole question, however, is—When is a person *subjecta* to a State? The adherents of one school hold that he is so only in the place of his domicile—a doctrine which others deny. Even in the view of the first class, the rule is followed by more exceptions than examples; and it is not sufficient to solve the question as to jurisdiction over conjugal wrongs. Even as to status, the status which the law of domicile confers is, as a general rule, confined to the two cases of marriage and legitimacy; and even to these there are exceptions. A marriage valid by the law of domicile will not be recognised in another country if it be incestuous, nor will the legitimacy of the issue be admitted.[2] The marriage of a Turk with four wives, though agreeable to the law of the Koran and of his domicile, is, in England and Scotland, treated as a nullity.[3] With regard to status of other kinds, illustrations equally striking might be advanced. A slave in the Carolinas, is no longer a slave when he comes to Britain.[4] The shadow of his slavery which pursues him in the land of his domicile, is chased away by the light of freedom. A nun and a monk are, in Italy, forbidden to marry; they lie under a legal disability; but in the British dominions every court of law would uphold their marriage.[5] In some countries nobles cannot trade; but if they come to Scotland and enter into contracts here, these contracts will be enforced, either in their favour or against them.

English Courts refuse to recognise personal capacity of the law of domicile.

It might be supposed that a law which is pressed so hardly against the decrees of foreign courts by English lawyers, would be very strictly adhered to by themselves, when a foreign status is pleaded to them. Let us see, then, how, in one of the

[1] Hertius de Collis, Leg. sect. 4, n. 8.

[2] Fenton v. Livingstone, 3 M'Queen, p. 497.

[3] Per Lord Brougham in Warrender v. Warrender, 2 S. and M'L., and dicta in Fenton v. Livingstone, 3 M'Queen, 497.

[4] Knight v. Wedderburn, Mor., p. 15,545; Somerset's Case, 11 State Trials, p. 340, Hargrave ed.

[5] Hailes' Decisions, p. 776.

most recent cases, this matter was dealt with. By the Code Civile of France, a marriage contracted in a foreign country, between two French parties, is only valid if the formalities prescribed by the French code be observed. It is needless to state here what these formalities are. It is sufficient to say that Leon Mallac of Paris, and Valerie Josephine Wilhelmine Simonin, did not observe them when they entered into marriage in 1854, at the parish church of St Martins-in-the-Field, in the county of Middlesex. They were both native subjects of, and domiciled in, France; "and the said pretended form or ceremony of marriage was had in contravention to, and in evasion of the law of France, regulating the marriage of domiciled French subjects contracted in foreign countries." This marriage was annulled, at the instance of the man, by the civil tribunal of the first instance of the Department of the Seine, sitting at Paris in 1854, as being contrary to the law of the domicile. In 1860, the woman (for some cause not appearing in the report), sought a decree of nullity from the English Divorce Court. The husband, at the time when this latter suit was raised, was domiciled and resident abroad, and the citation and copy petition were served upon him at *Naples*. Now, I take it to be clear that the Scottish Courts would not, in this case, have sustained their jurisdiction. The defender had neither a domicile nor a temporary residence, nor was he cited in, England, nor does he appear to have had any property or connection with England at the time when the suit was brought. Yet the full Court sustained the jurisdiction, upon the sole ground of the contract having been entered into in England. "The parties," says Sir Creswell Creswell, "by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal;" and he refers to a passage in Huber, totally ignoring, however, the important and well-known qualification by that writer, that the *forum rei gestæ* is competent, only when the defender is found within its territory.[1]

Jurisdiction *ratione contractus* asserted in England.

This is a bold aggression upon the rights of foreign nations. In order to realise the full extent of it, let the case be brought home to Scotsmen. The English jurisdiction (if this judgment

[1] Simonin v. Mallac, 2 Law Times, N. S. p. 827.

be sound) would be asserted against two Scottish people, resident and domiciled in Scotland, who had simply entered into marriage in England,—where the defender is not within the English territory, at the time when the action is instituted. If this be sound law, what necessity was there for all the evidence in the case of Dalrymple by Scottish counsel. The marriage, in that case, was in Scotland, and Miss Gordon might have obtained the judgment of the Scottish Courts, although the man who married her, was domiciled and resident in England. The decision, in short, of Sir Creswell Creswell, amounts to this, that the mere fact of contract, and where there is no domicile by the defender, or even personal presence in England, is sufficient to render the English Court a *forum competens*. It remains to be seen what respect the Courts of France, or of other countries, would give to such decrees, which startle one by their novelty and their importance.

Jurisdiction *ratione contractus* exists only to enforce not to annul contract.

But the more this judgment is examined, the more will it be found inconsistent with principle. Holding the undoubted doctrine that the *forum rei gestæ* (with the qualification of the personal presence of the defender) is a competent tribunal, this is only true for the *enforcement* of the contract. It is not competent in a suit for *annulling* it. Savigny, no doubt, in his recent great work, qualifies this doctrine. He admits the general principle, that suits for nullity are only competent *in foro domicilii;* but he maintains that they may be competent *in foro contractus*, when the parties, in the contract itself, make stipulations which contemplate the dissolution of the contract, or enter into a collateral agreement, having reference to such dissolution.[1] This qualification might be defended upon the ground, that the agreement as to dissolution constitutes a part of the contract, and therefore falls within the general principle. The question was lately raised in the Court of Session in reference to the case of breach of promise of marriage already noticed. It was there pleaded that an action of damages was not one for the enforcement of the contract, and was therefore one where the *forum contractus* was incompetent; and the authority of Savigny was relied on. But the Court held, that as they could not decree specific implement of the promise, an action of

[1] System des Römischen Rechts, vol. viii. p. 241.

damages was the only mode in which they could enforce the obligation, and therefore that they had jurisdiction. But the case of Mallac and Simonin was an action for *nullity*, pure and simple; and the point never seems to have been raised before the Divorce Court of England as to the incompetency of such a suit upon the ground now suggested.[1]

The rest of this remarkable decision is also not unworthy of study. The law of domicile,—that which, according to English Courts, regulates the status to be determined, is absolutely ignored. The *in fraudem* doctrine is also quietly set aside. It seems to have been considered so immaterial, that the Judge will not pronounce an opinion, as to whether the fact of an intention to evade the French law was proved. He then proceeds with an examination of the authorities, and expresses his opinion thus:—

The *in fraudem* doctrine set aside. Personal capacity determined by law of place of contract.

"Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation, to call upon any other nation equally independent, to surrender its own laws, in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law 'to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage.' Which would be for the common benefit and advantage in such cases as the present;—the observance of the laws of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent, whether both parties are French, or one only. Assume, then, that a

[1] The distinction must be drawn between a suit for *nullity* and a suit for *divorce*. The former is based upon grounds which go to establish that there never was a contract; the latter is founded upon a *factum*, which stands in the place of a contract, and an action of divorce is in the same position as one for enforcement of a contract. It is the right which arises from the *obligatio* which the delict creates.

French subject comes to England, and there marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid,—which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and, therefore, more for the interest of all, that the law of that country should prevail, which both are presumed to know, and to agree to be bound by?

"France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also, may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other; and if either is guilty of any breach of the *comitas* or *jus gentium*, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all. For these reasons, we feel bound to dismiss this petition. It may be unfortunate for the petitioner that she should be held a wife in England, and not so in France. If she had remained in her own country, she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made."

With this judgment upon the second point no Scottish lawyer will quarrel; and, let it be observed, that it is because the Courts of Scotland have proceeded on such considerations, that they have been followed by half a century of reproach, as if their conduct were something exceptional among civilized nations. All that they have done for centuries, is only what Sir Creswell Cresswell did, the very first time the question occurred before him. The Courts of both countries have rejected, in the interests of justice, the legal formula, that domicile must, under all circumstances, govern conjugal remedies and personal capacity; and that every consideration of national advantage, and of public morals, must be thrown out of view to give effect to it.

IV. It is now, however, time to consider another ground of jurisdiction asserted by the Scottish Courts, and which is thus referred to by the Lord Chancellor:—"Again the Scottish Courts claimed a right of jurisdiction, which was called *ratione originis*. If a Scotsman born went into another country, and abandoned his native land, acquiring a domicile elsewhere, the Scotch Courts said they had a right, with respect to him, to enforce the law of divorce, although he remained domiciled in a foreign country, *ratione originis*. That seemed to him to be very unreasonable, and contrary to all principle, because the law of divorce ought to be administered in the tribunals of the country where the parties were domiciled, and where they were known." Jurisdiction *ratione originis*.

If the Scottish Courts are unreasonable, and are acting contrary to principle, they do so in good company. I do not mean to press into service the authority of the Roman law on this subject. It will be found well stated in Savigny.[1] The rule extracted from it, and adopted by the nations that followed the Roman jurisprudence, is thus shortly stated by John Voet, in his Compendium Juris—Jurisdiction arises "originis intuitu in loco, in quo quis natus est aut nasci debuit, aut, si ex vica oriundus sit, in urbe cui vicus ille respondet, modo illic inveniatur."[2]

Hitherto this jurisdiction *ratione originis* has been asserted in cases where a Scotsman domiciled in a foreign country has been found personally present in Scotland.[3] The law upon this subject has been stated by Mr Ivory in his Annotations on Erskine, which may be received as an authoritative exposition of the law of Scotland, not merely because it comes from such a source, but because it has been recently approved, after deliberate argument, by one of the Supreme Courts of Scotland, in the case of Sinclair v. Smith, *supra*, p. 27.

[1] System des Römischen Rechts, vol. viii., p. 44.

[2] J. Voet, Compend. v. 1, 16; and Comment. v. 1, 91.

[3] Dunlop v. Dunlop, 9th Feb. 1789, Ferg. Rep. 259; with comment of Lord Brougham, 2 C. & F. 553. (See contra, Lunan v. Husband, 8th March 1796, Ferg. Rep. 260; and see Comment., 2 C. & F. 554. This was a case in absence, while Dunlop's case was contested, and deliberately decided.) Maclelland v. Her Husband, Ferg. Rep. 264; Bennie v. His Wife, 30th June 1849.

After stating various cases in which the domicile of origin, combined with other circumstances, will give jurisdiction, Mr Ivory lays it down positively, that "there can be no doubt, that the moment a Scotsman returns to his country, the jurisdiction of the native Courts at once revives, though he even be here transiently only.—Wilkie, 7th March 1629, *supra;* Calder, 19th January 1798, Fac. Coll.; Dict. v. Execution, App. No. 1; Dickie, 20th December 1811, Fac. Coll. But in this case the defender must either be cited personally, or have acquired a legal domicile by residence for forty days in one place."[1] If jurisdiction *ratione originis* be "contrary to all principle," the justification of the Scottish Courts is, that they did not invent it, but that it is a portion of law in every country which has fallen under the dominion of the Roman jurisprudence, and has been enforced and acted upon without question for many ages.

This jurisdiction asserted in England, under the name of perpetual allegiance.

And, as regards England, one may well be astonished at a doctrine sanctioned in a recent case, to which the epithets of the Lord Chancellor are more justly applicable. I introduce to notice the case of Deck v. Deck, decided in the English Divorce Court upon the 9th of July 1860,[2] which was an action for dissolution of marriage at the suit of the wife by reason of the husband's adultery and bigamy. The husband and wife were English people by origin. They were married in England in 1844. The husband left the wife in England, acquired a domicile in the State of New York, and there committed adultery by entering into a second marriage (his first wife being alive) with a woman *in the State of New York.* It will be observed that the *locus delicti,* and the domicile of the defender, were out of England; and he himself was also out of England when the suit was raised, and during its progress. The citation was given to him in New York; and he was called upon to answer to an English Court for his offence. In such circumstances, I humbly submit it to be plain, that the law of Scotland would have refused to interfere. It does not assert jurisdiction by reason of origin, unless the defender be caught within Scotland. That was not, however, the judgment

[1] Ivory's Annotations on Erskine, vol. i. p. 39.

[2] 2 Law Times, p. 542.

of the English Court. They held that they were a *forum competens*, because "both parties owed *allegiance* to the Crown of England, and obedience to the laws of England; that allegiance could not be shaken off by change of domicile. The husband, therefore, although he became domiciled in America, continued liable to be affected by the laws of his native country."

A new source of controversy has thus been introduced into International Law. A doctrine has been given effect to, which neither harmonises with our ideal of what is right, nor with our practical instincts. Because an Englishman owes allegiance to the Crown of England during his whole lifetime, he is amenable to the jurisdiction of the English Courts, for any thing done in the place of his domicile, after he has become the voluntary subject of a foreign State. If this be sound doctrine in a question of divorce, it is also equally available in reference to any obligation which the expatriated Englishman chooses to undertake.

Allegiance to Sovereign not a ground of jurisdiction as to private rights.

The idea of allegiance being a ground of jurisdiction, so as to enforce *contracts* between the Englishman and any other person, seems to have been first started by the Chief Justice of Pennsylvania, in his anxiety to find an excuse for the exploded doctrine of the case of Lolley.—(*Supra*, p. 15.)

The doctrine of perpetual allegiance to the Sovereign is one peculiar to English jurisprudence. An Englishman it is said, though he acquire a foreign character from a foreign domicile—though he formally renounce his primitive allegiance, and profess another—is accounted but a sojourner while abroad, and England is his home and country still. Insisting on jurisdiction over his person, absent or present, she regards any attempt to change his domestic relations as an invasion of her sovereignty; and thus the doctrine of the feudal law, applicable solely to the connection between sovereign and subject in their political relations, has been thrust into the Code of Private International Law. I do not intend to enter into any discussion as to the doctrine of allegiance, and the prerogative of the Sovereign. The subject has been learnedly elucidated by Allan, in his "Essay upon the Royal Prerogative." It may

be assumed that the law of England, as stated by Sir Matthew Hale, is correct, that "that lawful prince that hath the prior obligation of allegiance from his subject, cannot lose that interest without his own consent, by his subject's resigning himself to the subjection of another; and hence it is that the natural born subject of one prince cannot, by swearing allegiance to another prince, put off or discharge him from that natural allegiance; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due; indeed, the subject of a prince to whom he owes allegiance, may entangle himself by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot, by such a subjection, divest the right of subjection and allegiance that he first owed to his lawful prince." [1]

This amounts to nothing more than this—that, as regards subject and sovereign, the former owes allegiance to the latter,—is bound to serve him,—and is subject to the pains of high treason if he make war against him. This doctrine of allegiance, says Blackstone, "we have derived from our Gothic ancestors." [2] But these same ancestors never pushed the principle into the domain of municipal laws, so as to make it the ground of interference with contracts between private parties. Allegiance is due to the Crown of England, but only *sub modo*,—only as regards the Sovereign. The speculative doubt of the Chief Justice of Pennsylvania has been elevated into a rule of law, which would only be justifiable in the case *where there was no law* in the country of the domicile.

Doctrine of perpetual allegiance resisted by foreign nations.

But, surely, at this period of our history, English Jurists cannot be ignorant of the fact that, even as regards the political relationship between Sovereign and subject, the doctrine of the English law has been rejected in almost every other

[1] Historia Placitorum Coronæ, Works, vol. i. p. 68.

[2] See also Hallam's Middle Ages, Supplemental Notes, Note 196. Spence (Enquiry into the Origin of Laws of Modern Europe, p. 265), says, "The barbarian Sovereigns had a right to demand an oath of fidelity or allegiance from every freeman in their dominions. The Gothic Kings, who had a large proportion of Romans amongst their free subjects, and whose countrymen were particularly turbulent, rigorously enforced this right."

country, and has involved the Government in quarrels. The substantial reason of the ninth, is the fiction of the nineteenth century. Vattel lays it down as a principle of the law of nations, that any one may renounce his nationality, and may, without consent of his Sovereign, free himself of his allegiance.[1] Such is the law of France,[2] and the law of Russia, according to which the character of a Russian subject is lost by unauthorised residence abroad, by voluntary expatriation, and by disappearance.[3]

The most striking illustration of the inconveniences of the doctrine is found in the historical case of Napper Tandy, which is given at length in the fourth volume of the new edition, recently published, of Martens, "Droit des Gens," (p. 106.) In that case James Napper Tandy, born in Ireland, went to France, where he became domiciled and a naturalised French subject in the year 1794. He entered the service of the French Republic, and became a general of brigade. He headed an expedition to Ireland in 1798, which was unsuccessful, and fled to Hamburgh, followed by Roger O'Connor and two other companions in misfortune. The British Minister at Hamburgh insisted upon the arrest of Tandy as a British subject, which was effected; whereupon the Minister Plenipotentiary of the French Republic protested against this act of violence against a French subject,—a general of brigade of the French Republic, and demanded, without delay, the liberation of Napper Tandy. After certain intermediate proceedings, the city of Hamburgh delivered up the prisoners to the English Government; upon learning which, the French Republic laid an embargo upon all the Hamburgh shipping, and ordered its Ministers to quit the city. An appeal was then made by the city to Bonaparte to raise the embargo, in which they pleaded that their act was done under constraint, and they received from Bonaparte a characteristic letter, in the following terms:—

"GENTLEMEN,

"We have received your letter. It is no justification.

[1] Book I. c. 19, sects. 220, seq.
[2] Code Nap. Art 17.
[3] Revue Etrangere, vol. 3, p. 260.

Courage and virtue preserve States; cowardice and crime ruin them.

"You have violated hospitality. The most barbarous hordes of the desert would not have done this. Your fellow-citizens will reproach you for ever.

"The two unfortunates whom you have delivered up will die illustrious, but their blood will be more fatal to their persecutors than the operations of an army.

"BONAPARTE, *First Consul.*"

A deputation of the Senate waited upon the First Consul, and acknowledged its error. The embargo was raised; "and the crime of feebleness was expiated by the sacrifice of several millions, which were not useless to the First Consul, in consequence of the miserable condition into which the finances of the Republic had fallen."

And what was done by the English Government with their prisoner? He was tried before the Queen's Bench in Ireland, in 1800, and condemned to death, the doctrine of perpetual allegiance being asserted against him; but the French Government demanded his liberation from Lord Hawkesbury, Secretary of State for Foreign Affairs; and in 1802 he was liberated and restored to France.

Now, this was a case in which the British Government, if it intended to assert the doctrine, was peculiarly called upon to do so. But it shrunk at the trying moment, from carrying out the sentence of its own court of law, and, either under the pressure of political necessity, or under the conviction that it was required by the law of nations, the prisoner was given up.

The doctrine of perpetual allegiance, derived from "our Gothic ancestors," is somewhat unsuited to the times in which we live. One meets, every day, Americans, originally Scotsmen, whose home and country is in America, whose property and household gods are there. Are they to be hanged, drawn, and quartered as traitors, if, in the case of a war between America and Great Britain, they fight for their adopted country? What the American Government would do is obvious enough. The point was recently raised between America and Russia, in reference to a Russian by origin, who had been long

domiciled in America, but who, on the occasion of a casual visit to St Petersburgh, was at once seized and put into a regiment of line in the Russian army. The American Ambassador at once interfered, and claimed him as an American subject; and the Russian Government gave him up.

The application of this doctrine to the people of Scotland is of some interest and importance. If an Englishman become domiciled in Scotland, are the laws of England to be operative against him because he owes allegiance to the Queen of England; or, seeing that it is the same Sovereign who governs both kingdoms, is the doctrine of perpetual subjection and allegiance to the laws of England to be waived? By the Act 7 Anne, c. 21, the treason law of Scotland was abolished, and that of England was made the law of Scotland; and Baron Hume lays down the doctrine applicable to Scotsmen, in the same broad terms in which Sir Matthew Hale and Blackstone have stated it as to the people of England—"Go into what part of the world he may, and let him remain ever so long a stranger to his country, yet still he cannot hinder it from being his country, or make himself another man than nature had made him at his birth."[1] There was a signal instance of this in the case of Angus M'Donald, mentioned by Hume, and whose case is also reported in the State Trials,[2] who, though born in Scotland, was from his early infancy in France, and was there naturalised. He was concerned in the rebellion of 1745, having come as a French officer, and was condemned for high treason; but the Government here also shrunk from carrying out the sentence, and set him at liberty. Thus we see that even in the domain of politics, as to the relation of Sovereign and subject, the doctrine has led to disputes, from which the English Government have retired defeated; and when pushed still further into the domain of private international law, the result will be that the decrees of the English Courts based upon it, will be treated with even less consideration. The judgment in Deck v. Deck may be a good judgment in England; but Mr Deck will find in New York, in all probability, and with more justice, the doom of Lolley.

Whither the doctrine of the perpetual allegiance of English-

[1] 1 Hume, 534. [2] 18 State Trials, 857.

Allegiance as ground of jurisdiction not consistent with Lords' reasons.

men to the Crown of England will be made to follow them into Scotland, as it has done into America, has yet to be determined. At all events the "reasons" which the Lords have assigned to the Commons, are completely hostile to the assertion of such a doctrine in matters of private right, even with reference to countries governed by foreign sovereigns. The loss of the domicile of origin is said to constitute a complete exclusion of the jurisdiction of the Courts in *loco originis*. No doubt this "reason" was directed, not against jurisdiction from allegiance, but jurisdiction according to the old Roman formula—*ex ratione originis;* but it is applicable to both, if good as to one.

Doubts as to whether domicile from origin or allegiance should be maintained.

The assertion of jurisdiction against an expatriated Scotsman is pronounced inexpedient; and this reason brings the matter at once to the only rational test upon which these questions can be determined. It is a very fit subject for discussion, whether it is right to assert the municipal law of the domicile of origin, after the individual has become the citizen of another state. If the proposed restrictive legislation had been confined to the abolition of this jurisdiction, not only with regard to the Courts of Scotland, but also with regard to all the Courts within her Majesty's dominions, there might be no opposition stated to such a proposal. But when we see the jurisdiction from origin asserted in England, though under another name, it is difficult to apprehend the grounds for the indignation expressed against the Scottish Courts, while those of England are left without reproach. If the law is to be amended, it ought to be by a measure of a thoroughly imperial character, which shall control the whole of the discordant jurisdictions within the British Empire.

The domicile of succession considered.

V. In the Lords' Reasons, it is set forth as an axiomatic proposition, that "a suit to dissolve the tie of marriage ought to be entertained only by the Courts of the country in which the parties whose marriage is sought to be dissolved are *bona fide* domiciled, according to the well-known law by which the succession to moveable estate is regulated in cases of intestacy."

Now, I will assume that the first part of the proposition is correct, and that the law of the place of delict, and the law of

the place of origin must be entirely discarded. But upon this assumption I respectfully deny the second part of the proposition, and maintain that the domicile for *succession* has nothing to do with the domicile for jurisdiction. These two things are essentially distinct; and instead of covering pages not intended merely for professional readers, with citations from the commentators, and, in the hope of getting a hearing, even from English lawyers, I cite in support of this statement an English decision. In the case of Yelverton v. Yelverton—decided in the Divorce Court of England, December 1859, the rubric is in these terms:—"A person with a foreign domicile of origin may acquire an English domicile for the purpose of founding the jurisdiction of the matrimonial Court, without acquiring such a domicile for the purpose of succession."[1]

Domicile in divorce suits not the domicile for succession.

The matter has been much discussed in America, the result being that cases of divorce are treated as in a peculiar position. If a husband commit adultery, the wife is entitled at once to acquire a separate domicile, the commission of the offence authorising her to cease from a cohabitation which might bar her from her remedy by reason of condonation. An American Chief-Justice puts the case thus:—"The law will recognise a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home; bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise the parties in this respect would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife."[2]

A learned judgment on this matter was pronounced by the Supreme Court of the State of Maine in 1832, which has been approved by Kent[3] and Bishop (sect. 736), and which establishes rules of manifest expediency. The following excerpts from the rubric are specially referred to.[4]

"If the husband has forfeited his marital rights by misbe-

[1] 1 Searle and Smith, p. 49.
[2] Harteau v. Harteau, 14 Pick, 181, 185.
[3] 2 Kent, 110, note, 6th ed.
[4] Harding v. Alden, 9 Greenleaf, R. p. 140.

haviour, and has deserted his wife, they are capable of having different domiciles, in view of the law regulating divorces."

"If a married woman, domiciled in another State, having been deserted by her husband, establishes her residence in this State, she thereby becomes entitled to the benefit and protection of its laws, and her rights as a married woman will be recognised."

"Where a husband deserted his wife in this State and went into North Carolina, and she removed to Rhode Island, after which he committed adultery in North Carolina, for which cause she was divorced from the bonds of matrimony by the Supreme Judicial Court of Rhode Island, he having been personally cited to appear, but refusing to do so;—it was held that the divorce was valid, and that the wife was entitled to dower in the lands held by the husband in this State during the coverture, in the same manner as if they had both continued to reside here, and the divorce had here been decreed."

"A decree of divorce does not seem to fall within the rule laid down in Birrell v. Briggs (9 Mass. 462), that a judgment, rendered against one not within the State, nor bound by its laws, nor amenable to its jurisdiction, is not entitled to credit against the defendant in any other State than that in which it was rendered. Divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, should be recognised, in the absence of all fraud, as operative and binding everywhere."

"But this exception applies to the decree, only so far as it dissolves the marriage. If it proceeds farther to order the payment of money by the husband, such order would fall within the limitation laid down in Birrell v. Briggs."

And a learned American writer lays it down positively, that "the doctrine, that for purposes of divorce, the wife may have a domicile separate from her husband, is well established in the American tribunals," and "that the courts of the actual *bona fide* domicile of *either* may entertain the jurisdiction." [1]

Accordingly, if an Englishman or Italian brought his wife to Scotland and committed adultery there, she could, for the purposes of a divorce, immediately acquire a domicile, and insist upon obtaining redress from the Courts of Scotland. Nay, if

[1] Bishop on Marriage and Divorce, sect. 731.

he committed adultery abroad at a time when the residence, though not the domicile of succession of the husband, was in Scotland, the wife would be entitled to claim a domicile in the place of her hitherto temporary residence, and to demand divorce from the Scottish tribunals.

The domicile of forty days of the law of Scotland explained.

This is just an application of the rule of the English and American Courts, and this appears to be the foundation of what is called the jurisdiction by reason of residence for forty days. I am not aware of any case which has ever found that if a foreigner commit adultery abroad, then come to Scotland and there remain for forty days, his foreign wife, *who had never appeared in Scotland*, could sue a divorce against him. Such a rule as this would be utterly indefensible, and such a rule is without support from Scottish decisions.

But, on the other hand, if husband and wife both come to Scotland, and during the time of their residence there, the husband commit adultery *anywhere*, she may at once separate, and institute her action. It seems to have been required that he should be in Scotland during forty days before the wife could institute her action,—a rule erroneously borrowed from the one as to ordinary civil matters, which holds a defender subject to Scotch jurisdiction by residence during that period. Residence for forty days has nothing to do with jurisdiction in cases of divorce. The popular notion, and some loose practice, gave it countenance, but it is without the sanction of judicial authority.

Thus, then, the Lord Chancellor, in fixing upon the domicile of *succession* as the only ground of jurisdiction in divorce suits, violates another rule of international law, even supposing *domicile* to be in all cases the basis of such a jurisdiction.

Domicile of Succession ascertained with difficulty.

The criterion adopted—the domicile of succession—is stated to be "well known." Well known it certainly is,—the parent of a thousand law-suits,—the most shifting and uncertain thing within the range of jurisprudence,—one upon which there will be found more diversity of opinion than on any question that can occupy the attention of courts. It cannot well be otherwise. To determine it, we must ascertain the motives and intentions of a man who, in the case of a divorce, might have every interest to conceal them. Suppose an Englishman or a Pole sued for divorce in Scotland, after such a law as the Lord

Chancellor's, has passed, he at once answers the action by simply putting in a defence, to the effect that he had not, and never intended to make, a domicile in Scotland. How could this be met? Not merely by appealing to the *fact* of residence, for both the *factum* and *animus* are necessary. We cannot dive into the secret recesses of his mind to ascertain his real intention; and if we must recover his letters to find it there, we are sent on a hunt over Europe. To prove a living man's domicile where he has every motive to defeat you, and so as to satisfy not merely the Court where the decree is pronounced, but every foreign court where the divorce may be pleaded, is somewhat chimerical.

Even in the case where a man is dead, there are difficulties innumerable in the settlement of the question of domicile. The frequency of these cases indicates their difficulty. In a recent discussion in the House of Lords, the law Lords suggested that domicile should be defined by statute; but the absolute impossibility of making any definition, so as to reach the variety of cases that occur, put an end to this project. The facility of locomotion complicates the difficulty. The general diffusion of wealth enables men to select their residences according to the seasons,—to winter at Rome,—to be at Naples in the spring; and in the late summer and autumn in the British Islands. A prolongation of residence in Italy, originally arising from accident, may easily slide into a case of supposed permanent domiciliation; and hence, on the death occurring, the Government, for their taxes, and the relatives, according to their several interests, squabble over the grave in the fierce contest, as to whether the defunct died an Italian or an Englishman.

Where is the domicile for succession of the Lord Chancellor.

But generalities have far less effect in argument than examples. A great succession suit is clearly in store for Scottish lawyers. At the risk of scaring the game, I shall state a case that will prove not uninteresting to the learned Lord who is so much in favour of the law of domicile. In what country is the Lord Chancellor domiciled? Of course, so prudent a man has made his will, and "signed, sealed, and delivered" it according to the law of England, with which he is familiar, and which he has too easily assumed to be the law of his domicile. If the

rule established by the Privy Council in Stanley v. Bernes be correct, which requires the formalities of execution of a will to be according to the law, not of the place of execution, but of domicile, then the will of this high functionary stands somewhat in peril. His domicile at the present moment is clearly in Scotland. He is a Scotsman by origin,—was educated in Scotland,—and only left it in his manhood to push his fortune in England. No doubt, he has spent in that country a considerable portion of his life; but his affections were always centered upon his native land. He has two peerages in his family; and both the titles are taken from the county of Fife. The title of his son is "Stratheden," and he himself is "John Baron Campbell of St Andrews." When leisure came with high honours, and a successful career was crowned with wealth, where was it that he took up his local habitation? Not in England, where his fortune had been acquired, but at Hartrigge, in the county of Roxburgh. It is true that he still holds the office of Lord High Chancellor; but he is Chancellor not of England alone, but of Great Britain. The Great Seal accompanies him to Scotland, and he is only in London when the cruel necessity of business compels him to sever himself from the land of his affections. This is the case of Hog v. Lashley,[1] where a Scotsman went to England, and returned laden with spoil, to buy an estate in Scotland, still keeping up some connection with the mercantile house in London, through which his fortune had been acquired. The domicile of origin was there held to be easily acquired,—just as, in other cases, it has been held to be with difficulty lost. In the case of Sir Hugh Munro, he had been absent in England for eleven years; his establishment was in London. "There were his carriages, his furniture, his plate, his pictures, his library, his wines; every article of use or enjoyment in life according to the way in which he chose to live;"[2] and yet he was held to be a domiciled Scotsman. "There must be residence and intention; residence alone has no effect *per se*, although it may be most important as a ground from which to infer intention."[3] There must be, as Voet says, the "*propositum illic perpetuo*

[1] 4 Paton's Appeals, p. 581.
[2] Per Lord Corehouse, 1 Rob. Appeals, p. 574.
[3] Per Lord Chancellor, 1 Rob. Appeals, p. 606.

morandi." Surely it cannot be said that this distinguished individual, whose acts indicate such a hearty attachment to the country of his fathers, has any intention of perpetual residence in England. His household gods are at Hartrigge; and the only circumstance in favour of the English domicile is the accident of being an officer of the Government, which many Scotsmen are, and which might cease in a day by rebellion in the camp. The mere possession of, and residence in, a house in London, or the holding a temporary office, does not create a domicile. The distinction between residence and domicile is clear. There may be residence without domicile, and domicile without residence; residence is preserved by the act, domicile by the intention; and the intention for a Scottish domicile, cannot be mistaken.

In the elucidation of this case (which may occur in reference even to a question of legitim, supposing that the hint is taken of executing the will according to the formalities of the law of both countries), some curious information may be obtained in the enquiry after the intention. All the correspondence of the Chancellor for years will be ransacked; and the biographies of his two great contemporaries, now in his *escritoire*, will be made good evidence in the suit. The passages which describe the love of country, especially on the part of the Chancellor of the Edinburgh University, will make these interesting documents relevant in the question of intention; and if that renowned personage happen to be the survivor, the world will be favoured with a commentary upon his own biography by himself.

Now, it is a criterion so difficult to be fixed, as the Lord Chancellor may see in his own case—a criterion concerning which two minds honestly intending to arrive at a just conclusion may reasonably differ—that he seeks to establish as the sole ground of jurisdiction, on a subject where the jurisdiction should be easily elucidated, and perfect certainty attained. The case is not improbable that a Scottish Court might decide that the domicile was in Scotland; and at the distance of ten years, when the divorce is pleaded in an English Court, and the matter of domicile again inquired into, that Court would arrive at a different conclusion. There is nothing in the proposed clause which forbids an English Court to make such inquiry; and one would hesitate to affirm that it would give effect to the law

of nations, so as to hold the judgment of the Scottish Court to be *res judicata* upon the point.

No doubt, domicile is at present a ground of jurisdiction. The pursuer has his option to select either the forum of the delict or of the domicile. He would be foolish, indeed, if the same remedy were open to him in both, to select the latter; and the very prevalent adoption of the former is justified by the inexpensive and easy proof, both in the matter of jurisdiction and the merits of the suit.

Domicile in the will of the husband.

It must also be remembered, too, that domicile is in the will of the husband. He may change it in a moment; and what are the results? I borrow, on this matter, the words of the latest English lawyer who has treated it, and who, for the first time in England, seems deliberately to have considered, and rationally to have spoken of, jurisdiction on the ground of delict.

"To make domicile, a thing often uncertain, and always mutable, the test of jurisdiction, where the wife is the complainant, seems surely inexpedient. It is in the husband's power to change his domicile when and as frequently as he pleases. The wife's domicile follows his. Married in England, let us say, he suddenly starts for Scotland, or Ireland, or France, with a mistress, and sets up in Edinburgh, in Dublin, or in Paris, living there in constant and open adultery. He thus acquires a permanent foreign domicile. What, in this situation, is his foreign English wife to do? If she sues him at Westminster, the jurisdiction, if we suppose it to rest on domicile, is gone. If she follows him to the region of his new domicile, it may be a region in which divorce is not allowed, or, if allowed, he may change it and foil her. It is said that there ought to be a permanent domicile before granting divorce, because the *status personarum* is involved in the sentence. But if permanent domicile is liable to change, and if, in the case of ambulatory husbands, it is difficult of proof, we can hardly imagine a more precarious foundation for legitimacy of status. Why should not the wife, in the case supposed, have redress, on proof of personal notice and citation? Why should she not have the option to seek redress at home or abroad, either by asking it at Westminster, or going to the foreign jurisdiction,

where the proof may be easier and cheaper? Why should the husband's arbitrary change of domicile be suffered to frustrate or embarrass the injured wife's just remedy?" [1]

Opinions of English lawyers on Scottish Consistorial Law.

VI. The Lord Chancellor seems to be influenced by a noble motive. He has written the Life of Bacon, and appears to have pondered the 59th Aphorism of the "Doctrine of Universal Justice." "To reduce laws to order," says Bacon, "becomes a work of the utmost importance, deserving to be deemed heroical; and let the authors of it be ranked among legislators, and the restorers of states and empires." It is a great ambition, which history consecrates, and posterity reveres, when a man sets himself to renovate a nation's laws, and thereby shape the future destinies of its people. But it is an ambition that must be founded in knowledge. It must submit to criticism, and hear with patience. Above all, it must not set authority at defiance, and prefer experiment to experience.

The learned Lord has said many hard things about the laws of Scotland. It is not my object at present to defend the existing law of Scotland, in regard either to marriage or divorce. In one of the judgments of Lord Moncreiff,—who had as thorough a knowledge of consistorial law as any man who ever appeared in Scotland, having during his professional career of fifty years been, either as counsel or as Judge, engaged in every great consistorial case which occurred,—the marriage law was justified upon the simple ground, that no man can introduce into society, in Scotland, his mistress as his wife without making her so; and no man can give a promise of marriage to a girl, and then seduce her, without being obliged (if she prove the promise) to fulfil it.

But while thus defending our present law as to irregular marriages, it must be told, to strangers, that they are extremely rare, now that those at Gretna Green are put an end to. In reading the opinions of English lawyers on this subject, we do get upon the road to surprising facts. Dr Lushington, in his evidence before a Parliamentary Committee, gave them some interesting information. He said that "it was but

[1] M'Queen on the Law of Divorce, 2d edit., p. 251.

rarely that Scotch marriages took place in the face of the church, at least not very often, so far as he knew."[1] Before making this statement, surely a man with so great a name as Dr Lushington should have made inquiry. Has he ever been in Scotland? We have still some regard in the North for decorum. He will, perhaps, be surprised to learn, that not one case in a thousand is celebrated otherwise than in *facie ecclesiæ;* and the exceptional cases are those where every man is glad that a poor girl can vindicate her character, though it be through an irregular marriage.

Lord Campbell, also, in the year 1849, gave evidence before the same Committee of the House of Commons, which had to consider Mr Rutherfurd's Marriage Law Amendment Bill.

Lord Campbell.—"At present a marriage (in Scotland) by a Dissenting clergyman, I rather think, is not strictly regular. There are statutes forbidding marriages unless by clergymen of the Established Church.

"To show the evils of the present law, nothing can be more striking than a return which was made to the House of Lords in obedience to an order made on the motion of Lord Aberdeen, with respect to the number of suits that have been instituted since the jurisdiction was extended to the Court of Session" In answer to the question,—how many were appealed to the House of Lords?—he said, "It is not merely in matrimonial suits that the question arises."

The following question was then put to his Lordship:—"When Lord Brougham was under examination, allusion was made to questions on which the judgment of the Court of Session had been reversed, and questions where the marriage had been supported by evidence, has your Lordship any information on that point? Ans. There have been several since I sat in the House of Lords; there was one the Session before the present. I think the last Session of Parliament there was one where we reversed the decision; I think it was a case from Glasgow."

Alas! this assailant lay open at every joint of the harness; and was thus disposed of:—

"From the speech of his right honourable and learned friend (Lord Advocate Rutherfurd), it might be supposed that the amount of litigation arising out of the state of the marriage law of Scotland was enormous; that the House of Lords itself was groaning under the load of difficult and doubtful cases that were brought before it by appeal, and which would all be prevented by the present Bill. The evidence of the noble Lord (Lord Campbell) was certainly calculated to convey the impression,

[1] Report of Select Committee on Marriage (Scotland), 24th May 1849, with Minutes of Evidence (Commons).

that during his judicial experience in the House of Lords, he had been exposed to great difficulty and embarrassment in wading through cases of that description, constantly brought before the House by appeal from the Scotch Court; and that, as might have been expected where the cases were so numerous, and so difficult and doubtful in evidence, the disagreeable duty of differing from the Court below, and reversing its judgments, had been very frequently imposed upon the House of Lords. But from a return of all the cases of declarator of marriage or legitimacy that had occurred during the last seventeen or eighteen years, which had been moved for by the Earl of Aberdeen, and was alluded to by the noble and learned Lord in his evidence, and since then communicated to this House, it appeared, that during the whole period embraced in that return, there had been in the House of Lords only six cases, and only one reversal. And of these six cases, three, including the reversal, had nothing to do with the subject-matter of the present Bill. They were not cases in which there was any doubt or question as to the validity of any marriages. They were cases as to whether the marriage in the circumstances had the effect of legitimating the children previously born, which was a subject not touched by the present Bill; and the noble and learned Lord himself had said, that he most highly approved of the Bill expressly leaving the law of legitimation by subsequent marriage untouched. It farther appeared, that of the remaining three cases, two had been decided before the noble and learned Lord had sat in the Upper House, and only one since that time. But the noble and learned Lord explained very satisfactorily that he referred also to cases which did not appear in that return; and he explained why it was that they did not so appear. He explained that it is not merely in matrimonial suits that the question of marriage or legitimacy arises,—that it arises also in suits as to property—the right to the property depending on the legitimacy of one of the parties,—so that the question of marriage came to be tried and decided incidentally in the question of property. And the noble Lord gave an instance of a case of that description from Glasgow which had occurred last Session, and in which the judgment of the Court below, on the point of legitimacy, had been reversed in the House of Lords. That explanation was quite intelligible, and so far might be considered satisfactory. But as the noble Lord's recollection did not enable him to give a reference to the other cases of that class which had occurred, and as he (Mr M'Neill) thought it better not to rely on generalities when precise information was within reach, he had moved for a list of all cases that had been decided in the House of Lords on appeal from Scotland, in reference to rights of property, in which the legitimacy of any party had been raised as a point for decision, since the 1st January 1839, embracing more than the period during which the House of Lords has had the benefit of the noble and learned Lord's judicial assistance in deciding such cases. He now held in his hands a copy of that return. The first two cases embraced in it were questions as to legitimation by subsequent marriage, and therefore not within the scope of this Bill, or of the evidence of the noble and learned Lord. The third case in the

return was a proper case of marriage and legitimacy. It was one of the three cases of that description which had appeared in Lord Aberdeen's Return, and it was the only one of them which had been decided during the time of the noble and learned Lord. In that case the judgment of the Court below was affirmed. This exhausted the proper cases of marriage and legitimacy. One case in ten years. But then we come to that other class of cases to which the noble and learned Lord referred—not proper cases of marriage, but cases of property, in which the legitimacy of one of the parties was incidentally raised as a point for decision; and to that class of cases we must look for the labours and difficulties which had so oppressed and perplexed the noble Lord, and for the numerous judgments of reversal which it had been his duty to pronounce; for of course they were not to be found in the one case of marriage which had been affirmed. Now, as to that other class of cases—namely, questions of property,—there was of course the case from Glasgow, to which the noble Lord had particularly referred as an instance of reversal; and there were how many more? not of reversals, but of cases altogether? absolutely none—not one. The case from Glasgow was actually the only case of the class that had occurred during the whole period of the judicial experience of the noble and learned Lord; and as the reversals could scarcely be more numerous than the cases, it was not wonderful that the noble Lord was unable to refer specifically to any other instance of reversal. But what must be the astonishment of the House when he informed them that this Glasgow case was not reversed. It was affirmed. It was affirmed with costs; and it was affirmed with costs after a speech from the noble and learned Lord himself urging its affirmance."[1]

The lesson was not appreciated! In the year 1856, when Lord Brougham introduced the Bill, which afterwards became an Act of Parliament,[2] for the abolishing of Border marriages, the following speech was made on 20th May 1856:—

"Lord Campbell thought the Bill would not add to the lustre of the name of his noble and learned friend, because it would not accomplish what it professed to do. His noble and learned friend proposed that those marriages which he called irregular marriages, should not be legal unless the parties had been domiciled for three weeks in Scotland. He (Lord Campbell) believed that this would be no remedy at all, but would be the cause of a great deal of fresh doubt upon the subject. His noble and learned friend had introduced a new element of doubt as to regular and irregular marriages. What was an irregular marriage? If an Episcopalian bishop performed a marriage in Scotland, that he believed would be an irregular marriage. Marriages could not be legally performed by any Episcopalian within the realm of Scotland. All such marriages were irregular, and any persons so married might be summoned before the Court

[1] Speech of Mr M'Neill, M.P. for Argyllshire.
[2] 19 & 20 Vict. c. 96.

of Session and be rebuked for living as man and wife without being regularly married. A marriage by a seceding minister would not be a legal marriage. It must be by a minister of the Established Church, after the due proclamation of banns. He did not think his noble and learned friend would effect any great remedy by this Bill, and that he would only introduce new difficulties into the question if he carried it. It would not operate in mitigation of the evils complained of, and he hoped, therefore, his noble and learned friend would not press it."—(*Times' Report*).

Now it must be satisfactory to the Lord Chancellor to know that this Bill has been completely successful. The historical blacksmith is no more; and the horde of drunken English ruffians, who used to congregate at the toll at Berwick, have betaken themselves to honest pursuits. It must also be a satisfaction to his Lordship to be informed—*First*, that no doubt whatever has arisen upon the Act; *Secondly*, that a marriage by an Episcopalian bishop was, during a period of 146 years before this speech was uttered, a regular marriage by the law of Scotland![1] and that, *thirdly*, a marriage by a seceding minister was,—not merely a legal, but a regular marriage, according to that law, for twenty-two years before Lord Campbell gave this information to the House of Lords![2] and *finally*, that rebukes by the Court of Session are administered only in two cases, viz. when there is a breach of interdict, and when there is undue loquacity by counsel.

The Lord Chancellor is a great Judge, but this speech does not represent him fairly. Nothing could more forcibly illustrate the necessity for a Scottish legal peer in the House of Lords. That House is the ultimate tribunal in Scottish suits, and it makes one tremble, when one thinks of the great interests at stake, to find that one of its ablest members possesses just such a knowledge of our law as this speech discloses. It is high

[1] What could Lord Campbell have been thinking of? The point is one, too, not so much of Scottish law as of national history. The right to celebrate marriages was conceded to the Episcopalian clergy by the famous Toleration Act of Anne (10 Anne, cap. 7, sect. 5). It will be seen that it is not a hasty opinion, but deliberately entertained. It was given in the most deliberate way to the Parliamentary Committee in 1849, as it was to the House of Lords in 1856.

[2] By the Act 4 & 5 Will. IV. cap. 28, sect. 2, it is enacted, "that it shall be lawful to all persons in Scotland, after due proclamation of banns there, to be married by priests or ministers not of the Established Church, and also for such priests or ministers to celebrate marriages without being subject to any punishment, pains, or penalty whatever."

time that the agitation were once more revived for another Appellate Court, or for a reconstruction of the present one.

VII. I now come to the result of all this argument. The time has not yet arrived for legislation; but if we are to have it, it ought to be in concert with the governments of other countries. International Law not ripe for codification.

The law of nations, as respects private rights, is the product not of legislative action, but of the closet. It is founded entirely on expediency,—a shifting basis, according to the lights of individual courts, and the political necessities of the hour. Hence it is that there is so much contrariety of opinion, and hence the practical evils arising from discordant and independent judicatories. Political interests, religious antipathies, and local prejudices, must necessarily influence the judgments of courts in reference to transactions in foreign countries, or between foreign people. "Des convenances particulières, des intérêts de commerce, des combinaisons profondes de la politique, ont introduit, entre les différens Etats, des liens particuliers, qui font quelquefois, exception aux règles generales du droit des gens."[1] Nay, even baser influences are at work in the American States, with reference to foreign bankruptcies. But all this must in the meantime be submitted to as an inevitable evil, in the hope of better things to come. *Maximus novator tempus* was the *dictum* of a great man. Time is indeed the true vindicator of justice, as Lolley's case has shown. After a period of error, a change comes over the established dogma. It is first surrounded with a hundred exceptions, and finally departs. As juridical science advances, men, who have not originated, have no enthusiasm on behalf of, ancient error, and we cannot find more remarkable illustrations of this than in three doctrines which have passed away within our own day.

The famous doctrine of "indissolubility" flared fiercely enough in the Heavens for a time, but it rose and culminated within a single generation. The career of the *in fraudem* doctrine, though longer, was equally decisive; and a still more celebrated doctrine than either, has, within living memory, been consigned to oblivion: I refer to the doctrine of *tacit contract*. When a Instances of old doctrines being recently abandoned.

[1] Merlin, Questions de Droit v. Etranger, sect. 2.

man and woman marry, their rights in each other's property are governed by the law of the matrimonial domicile. But the husband, at pleasure, can change the domicile. Can he change the law? Can he subject the wife to a law which gives her no terce, no *jus relictæ*, while she had these by the law of the matrimonial domicile? That he cannot, is a doctrine supported by great authorities. A *tacit contract* is said to be entered into between the spouses to the effect that, wherever they may wander, the law of the matrimonial domicile shall govern their rights, and this although they may have lived and died under the government of another State, except during the brief period, when they were resident in the matrimonial domicile. Dumoulin, and Huber, and Hertius, and Rodembourg, and Bouhier, and John Voet, and Merlin;[1] in short, the writers who have contributed more to the science of international law than all the courts of Christendom, are in favour of the doctrine of tacit contract. Yet, when brought to the test of judgment, in a great case from Scotland, decided in the House of Lords, it was at once rejected by Lord Eldon;[2] and thus passed away,—at least in the British empire,—the once famous doctrine, the discussion of which covers so many fiery pages, and which stirred into passion even the torpid blood of jurists who wrote in Latin.[3] It was invented by Dumoulin, and he is charged with something like idiocy for his speculative opinion; at all events, he was labouring, according to Froland, under the influence of a heated imagination, and uttered words without sense or reason.[4]

Slow progress of formation of international law.

With such facts before us, it is very obvious that private international law is, and will long remain, in a state of chaos. It is in the same state of formation as is indicated in geology by

[1] Molin. Conc. 53; Rodembourg, c. v. t. 2. This treatise will be found printed along with Boullenois. Hertius, vol. i. sect. 4, p. 143, n. 46; Huber de Conflictu Legum, lib. i. tit. 3, sect. 9; John Voet, 23, 2, 85; Bonhier, c. 23, sect. 69, 74; Pothier, Tr. de la Commun. Art. Prel. tr. 10, 11, 12; Merlin, Rep. v. Communante, and in Questions de Droit v. feodalité, 1st ed. Merlin comes to a different conclusion in later editions.

[2] Hog v. Lashley, 1 Rob. Pers. Suc. 429, seq.

[3] Non habet rationem, says Argentræus of Dumoulin, vol. i. p. 656.

[4] 1 Froland, Mem. p. 316.

the old red sandstone. It is but inadequately described by any of the terms that refer it to the constructive wisdom and industry of man. It has not been made, but has grown, and is now growing. *Crescit occulto velut arbor ævo.* In some places it has fared better, and its growth has been more natural and regular than in others. When, however, the audacious spirit of codification (confined, too, to one country) shall be allowed to lop and trim the tree, its growth is at an end, and what we gain in trimness we shall lose in strength and elasticity. Let us be warned in time by the fate of France. Judgments have been given under that Code, which are at war with every rule of every school. The law of domicile, of contract, of delict is set at nought. If a domiciled *Scotsman* divorce his wife for adultery *in Scotland*, and so be rendered a free man by the law of his domicile, the divorce is treated as a nullity in France. The second wife is a concubine, and her children illegitimate.[1] Divorce, wherever granted, is relegated to the same class of things as slavery and incest, and a foreign judgment which sanctions it is a nullity, and treated as contrary to good morals and public order.[2]

The *history* of private international law shows how slowly it has arrived even at its present imperfect state. In the time of the Romans, who dominated the world, there could be no private international law, such as that which now governs the intercourse of European States. Even Cicero had no definite idea on this subject, for his *jus gentium* is nothing more than the general *jus naturæ* which governs mankind as rational beings, as distinguished from the lower animals, and which he opposes to the *jus civile*, or the internal jurisprudence of a State.[3] The definitions of other Roman lawyers, of the *jus gentium*, were equally defective. The definition of Ulpian,[4] which is sometimes quoted,

[1] The contrary had been decided by the Tribunal of First Instance of Paris on 22d Feb. 1842 (Gazette des Tribunaux, 23d Feb. 1842), but the judgment was reversed by the Cour Royale de Paris on 28th March 1843 (Dev. Cas. 43, 2, 566; and see judgment of the Court of Bourdeaux, 7th Jan. 1845, Dev. Cas. 45, 2, 215).

[2] De Chassat, p. 263.

[3] De Off, Lib. i.

[4] Quod naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur; vocaturque jus gentium quasi quo jure omnes gentes utuntur.—*Dig.*

is nothing more than that branch of the internal law of a State which is not peculiar to it, but which it enforces in common with other nations. No doubt, if there had been a necessity for such a code, the Roman lawyers would have shown in this, the same philosophical sagacity which enabled them to compile that wonderful collection of legal rules, which has formed the source of the jurisprudence of so many nations. It was only after the division of Europe into many kingdoms, that the necessity for international law originated; and one jurist after another, each profiting by the labours of his predecessor, framed a system more or less complete, and more or less influenced by local circumstances. The work of Grotius made its appearance in the year 1625, and constitutes the basis of modern international law. The writers upon the subject have been numerous; and no one can read their treatises without seeing how slowly the subject was moulded into shape in their hands, and how much yet remains of debateable ground to be cleared. One marked improvement observable in the reports of the decisions of all modern nations (*excepting England*) is the increased respect given by the courts of one country to the decisions of another, and which has elevated the *comitas gentium* from a mere rhetorical phrase into a practical reality. In the German preface to the work of Von Martens, he mentions that a proposal was made to the National Assembly of France in 1795 for a congress to frame a code of international law. Von Martens did not consider this proposal (which was unsuccessful) as suited to the troubled times in which it was made, or to the stage at which international law had arrived. But it might be considered a fitting subject, not for immediate legislation, but for an international congress now. Some good would result at least from an attempt between the great Powers to discuss the subject. In all probability it would at first be unsuccessful, when we see how little progress it has made in such a country as Germany. One would have imagined that in that country, where there are no less than thirty-six independent States, the subject would be reduced to something like order, by innumerable decisions; yet, in a Treatise upon International Law, by an advocate at Frankfort-on-the-Maine, published in 1841, there is scarcely one single decision of a German

International Congress to settle international code.

Court referred to, while, on the other hand, there is much writing about the case of Lolley, and the Scotch decisions; and references are made to Scottish and American law books with singular accuracy, and a thorough comprehension of their import.[1]

Duty of Courts of England to uphold decrees of Foreign Courts.

The first step to effectual progress in private international law for the British empire, would be, to teach the English Courts the duty of paying more respect to the decisions of courts of independent and allied nations. By the laws which bind under one sovereignty the two kingdoms of England and Scotland, no provision was made as to the effect to be given in one nation to the judgments of the other. The matter was left to the rules of international law; and these have been interpreted in England in the narrowest spirit. It is something very emphatic, no doubt, to treat foreign decrees as waste paper; but it is not international law—*c'est magnifique, mais ce n'est pas la guerre.*

Will English people never forgive Bannockburn! On the north side of the Tweed, their old enemies have long forgiven, though not forgotten, Flodden! No Scotchman, indeed, ever thinks of the one without elation, or of the other without tears. But there is in this sensibility none of the insolence of triumph nor the rancour of undying revenge! The case appears to be otherwise in England. The judgments of the Supreme Courts of a friendly kingdom are treated with a discourtesy, that would be inexcusable in reference to the decisions of a Turkish cadi or a Texan slave court. No regard whatever is given to the fact, that, in the estimation of a Supreme Court, enjoying jurisdiction under the same sovereign, and having equal rank, dignity, and eminence, a different view is taken of the law of nations. That simple fact should surely induce the English Courts to pause before throwing the interests of individuals into utter uncertainty, unsettling their status, and fixing them in one country as bastards, while in the other they are legitimate. A court having the same rank, under the same constitution, had already determined the matter. Would it not be better, in such a case, to say that, as it was within the compe-

[1] Entwicklung des Internationalen Privatrechts, von Dr Wilhelm Schœffner, Advokaten, zu Frankfurt-am-Main, 1841.

tency of the Scottish Court to pronounce on the point of jurisdiction, the question was thereby settled?

So far, however, from considerations like these weighing with the English Courts, they never appear to have given them a moment's thought. They take a different view of jurisdiction; and, *therefore*, without regard to consequences, they refuse to recognise the validity of a Scottish decree. Lolley is sentenced to transportation; and the other judgments which followed it—proceeding on totally different grounds—have set aside divorces by the Supreme Courts of Scotland, as if they had been the decrees of a petty court in some outlying dependency of the Turkish empire. Of course, if the English Courts take up this position, of setting their hand against every man, they must anticipate the inevitable result of "retorsion"—in which spirit every other country may in the end treat English decrees as idle and unmeaning formalities, and so by degrees shall we get back to the wild uproar of the Middle Ages. The Irroquois, who eat their prisoners, have a law of nations. When a matter is once settled by an assembly of chiefs, it is held settled through the whole Indian world. It unquestionably should be so in the whole dominions of the Queen, when one of her Supreme Courts has pronounced judgment. Let it be observed, that it is not from any peculiarity of *English* law that these deplorable results have come. It is simply because Dr Lushington (without reason assigned) chose to ally himself to one particular school of international jurists, which enthrones the dogma of *actor sequitur forum rei*—meaning thereby *forum domicilij*—as against *locus regit actum*, or *ubi te invenio ibi te judico*. He held that the Scottish Courts had taken a wrong view, not of English, but of international law. The Scotch divorce was therefore a nullity; and such a proceeding as this, without any appeal to reason or authority, is expected to be quietly submitted to. Of course, this decision has been followed up with characteristic determination. "A philosopher," said Pangloss, spitting out his last tooth with his expiring breath, "should never change his opinions." Lolley's case made the courts the slaves of an idea, hastily taken up. The Scottish divorce of an English marriage must be declared bad on one ground or other; and thus Scottish decrees are annulled,

after all the circumstances which induced the Courts of England to entertain enmity against them, are altered or reversed, and when the original idea of "indissolubility" has been abandoned. Is not all this very like the cases of the bigot and the human eye—the more light you throw on the one or the other, the more they contract!

Legislation for Scotland alone premature.

But even supposing that the judgments of the Supreme Courts of Scotland are in England held as of no more value than those of Turkey, must we immediately resort to legislation. Can it, with any sense of propriety be said, that the subject is ripe for codification, when we find as many different expositions of it as there are States, and when the examples of codification are the great beacons of error. The matter must be first reasoned out in the Courts, and the decisions must be tested by experience. Modifications, too, of old doctrines will result from the increased intercourse of these days; and much may be done when the narrow spirit of national rivalry and jealous antipathies shall still more recede before advancing civilisation. The time is not far distant, when the Christian precept of doing to others as we would that others should do to us, shall be held applicable to nations as to individuals, and that it is both a judicial error and a national misfortune to annul foreign judgments (untainted by immoral or irreligious elements), merely because they happen not to be in unison with local opinion.

It is no doubt true that, in the meantime, many evils arise from the diversity of expositions of this unsettled science. The English Courts acknowledge this, and yet insist on their own opinions, as in the two remarkable cases of Simonin and Deck. Yet these Courts are not intended to be checked. Why not compel the Divorce Court of England to remit all parties to the law of domicile? The misery is as great in allowing freedom of action to it as to that of Scotland; but the Lord Chancellor says nothing as to putting a bridle on the former. And even supposing the disputes between England and Scotland adjusted, there still remains the conflict with the laws of other states. The outcry, indeed, about a man being married in one country, and not in another, will never cease, until we come to that millennial era when there is to be but one nation, or until a grand international congress has made a code for all mankind.

The settled convictions even of a great Judge must not be allowed to hurry us into legislative action, which, in a few years, will in its turn require to be corrected. "In hot reformations," says Burke, "in what men call *making clear work*, the whole is generally so crude, so harsh, so indigested; mixed with so much imprudence, and so much injustice; so contrary to the whole course of human nature and human institutions, that the people who are most eager for it are among the first to grow disgusted at what they have done. Then some part of the abdicated grievance is recalled from its exile, in order to become a corrective of the correction. Then the abuse assumes all the credit and popularity of a reform. The very idea of purity and disinterestedness in politics, falls into disrepute, and is considered as a vision of hot and inexperienced men; and thus disorders become incurable, not by the virulence of their own quality, but by the unapt and violent nature of the remedies. A great part, therefore, of my idea of reform is meant to operate gradually; some benefits will come at a nearer, some at a more remote period. We must no more make haste to be rich by parsimony, than by intemperate acquisition."

There is no one so intolerant as the victim of a theory. Justice and humanity must bend before it. It rouses a passion that brooks neither hostile criticism nor impartial inquiry. It insists on "something being done," without respect to the good or evil elements of the measure,—it demands a practical solution without a logical examination, or an argumentative analysis. In its presence the voice of authority is the echo of antiquated absurdity; the warnings of experience are the exceptional aberrations of timid and ignorant minds. No doubt the course of human affairs, and the necessities of the public interest, impose many changes. But there is nothing to be gained by needlessly fingering an ulcer. This country, at least, does not love change for the sake of change; much less does it wish to fall back upon narrow and exploded theories, from which other nations are seeking to escape. We have certainly learnt the salutary power of that reform which continually adapts laws to the new wants of the day, and which alters neither more nor less than the occasion requires. What,

however, is now proposed to be done, goes far beyond the occasion; and the wrong mode of doing it, has been too eagerly seized. When it is proposed to frame a code of international law, in fraternal congress with other nations, the public will be prepared to listen. The scheme may be premature, but it is not so Utopian as it was when, amid the din of arms, the proposition was submitted to the National Convention. But whether it be practicable or not, at least this is plain, that any legislation on this subject must embrace the entire British Empire. Scotland must not be stretched on the Procrustean bed of an Act of Parliament, while England is left free; and if we are to have the "domicile of succession" as the sole basis of jurisdiction, we must be told what this is, and how to find it.

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